The Advocate

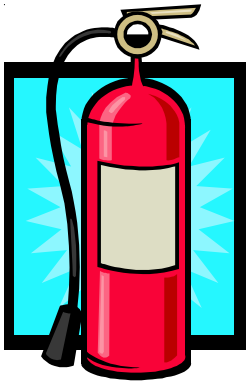
Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

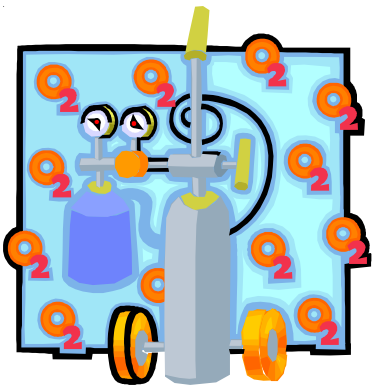
Volume 27, Issue No. 5 September 2005

One of the Finest: Remembering the Life of Colonel Paul G. Tobin

Colonel Paul G. Tobin

Possession of Anhydrous Ammonia and Lesser Included Offenses





DPA ON THE WEB

DPA Home Page http://dpa.ky.gov/

DPA Education http://dpa.ky.gov/education.html

DPA Employment Opportunities:
http://dpa.ky.gov/eo.htm

***The Advocate* (since May 1998)**:
http://dpa.ky.gov/library/advocate.html

Legislative Update:
http://dpa.ky.gov/library/legupd/default.html

Defender Annual Caseload Report:
http://dpa.ky.gov/library/caseload04.pdf

Please send suggestions or comments to DPA Webmaster
100 Fair Oaks Lane, Frankfort, 40601

****

DPA'S PHONE EXTENSIONS

During normal business hours (8:30a.m. - 5:00p.m.) DPA's Central Office telephones are answered by our receptionist, Alice Hudson, with callers directed to individuals or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. For calls answered by the automated attendant, to access the employee directory, callers may press "9." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call — this will aid our receptionist's routing of calls and expedite your process through the automated attendant.

Appeals - Evelyn Charry	#117
Capital Trials	#220
Computers - Ann Harris	#130
Contract Payments - Glenda Cole	#403
Education - Lisa Blevins	#236
Frankfort Trial Office	(502) 564-7204
General Counsel - Ardis Roederer	#169
Human Resource Manager - Marcia Allen	#139
LOPS Director - Al Adams	#116
Post-Trial Division -	#201
Juvenile Dispositional Branch - Hope Stinson	#164
Law Operations - Karen Scales	#111
Library - Will Geeslin	#119
Payroll/Benefits	#136
Personnel - Cheree Goodrich	#114
Post Conviction	(502) 564-3948
Properties - Larry Carey	#218
Protection & Advocacy	(502) 564-2967 or #276
Public Advocate - Shannon Means	#108
Recruiting -	#200
Travel Vouchers -	#118
Trial Division - Sherri Johnson	#165

Table of Contents

The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Justice & Public Safety Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

The Advocate strives to present current and accurate information. However, no representation or warranty is made concerning the application of the legal or other principles communicated here to any particular fact situation. The proper interpretation or application of information offered in *The Advocate* is within the sound discretion and the considered, individual judgment of each reader, who has a duty to research original and current authorities when dealing with a specific legal matter. *The Advocate*'s editors and authors specifically disclaim liability for the use to which others put the information and principles offered through this publication.

Department of Public Advocacy
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006, ext. 236
Fax: (502) 564-7890
E-mail: Lisa.Blevins@ky.gov

Paid for by State Funds. KRS 57.375

FROM THE EDITOR...

Jeff Sherr

Possession of Anhydrous Ammonia. B. Scott West continues his series of excellent litigation guides about methamphetamine with a new article on offenses related to the possession of anhydrous ammonia.

Paul G. Tobin. This summer Kentucky lost one of the founders of the public defender movement in Kentucky. The former Executive Director of the Louisville-Jefferson County Public Defender Corporation is profiled in this article republished with permission of *Louisville Bar Association.*

Exoneration Study. Hardly a week passes without another headline announcing the exoneration of another innocent. Northwestern University's "Exonerations in the United States 1989 through 2003" is reviewed in an article by Margaret Case.

Mark Stanziano's Farewell. Former KACDL President and regular faculty member for DPA education, Mark Stanziano, has relocated to become a Managing Attorney for Minnesota's Public Defender's Duluth office. In a moving open letter to Kentucky's public defenders, he thanks the many public defenders he learned from and expresses his confidence in the positive future of the DPA.

Citing Unpublished Opinions. Supreme Court Justice Martin E. Johnstone discusses the growing trend toward citing to unpublished opinions. ■

Immigration Resources
NLADA's Defending Immigrants Partnership provides free online resources for criminal defense lawyers representing clients with immigration issues at:
http://www.nlada.org/Defender/Defender_Immigrants

POSSESSION OF ANHYDROUS AMMONIA AND LESSER INCLUDED OFFENSES (WITH JURY INSTRUCTIONS)

by B. Scott West, Murray Directing Attorney

B. Scott West

In order to make methamphetamine under the ephedrine reduction method, also known as the "Nazi" method (because *allegedly* it was developed during World War II by Nazi scientists, acting upon Hitler's orders to find an easy way to make methamphetamine so he could keep his armies fighting for hours on end), it is necessary to have anhydrous ammonia. "Anhydrous" means without water, and the manufacture of methamphetamine has several steps during which it is important that no water interact with the mixture. For this reason, regular cleaning ammonia, which has water in it, cannot be used for the task.

According to *Van Nostrum's Scientific Encyclopedia*, anhydrous ammonia begins to vaporize in atmospheric conditions at temperatures above –33 degrees Celsius, or –28 degrees Fahrenheit. Thus, it must be kept under pressure to maintain liquid form. Anhydrous ammonia is usually stored at pressures up to 40 psi, and is kept in cylinders containing up to 150 lbs. Because it is the fifth highest-volume chemical produced in the United States, it is readily available, especially in farm lands, because of its use as a fertilizer. However, it can also be used as a refrigerant, and therefore can be found virtually anywhere in the U.S.

There are three basic offenses dealing with Anhydrous Ammonia, with penalties ranging from a Class D felony to Class B felonies (for first offenses), and they are: (1) possession of anhydrous ammonia in an unapproved container, (2) tampering with anhydrous ammonia or anhydrous ammonia equipment, and (3) theft of anhydrous ammonia.

I. Possession of Anhydrous Ammonia in an Unapproved Container.

KRS 250.489 provides:

(1) It shall be unlawful for any person to knowingly possess anhydrous ammonia in any container other than an approved container.
(2) The provisions of this section shall not apply to trained chemists working in properly equipped research laboratories in education, government, or corporate settings.
(3) It shall be an affirmative defense to prosecution under this section that the anhydrous ammonia is possessed for the sole purpose of agricultural use.

KRS 250.991(2) "Penalties for violation of anhydrous ammonia provisions" provides in pertinent part:

(1) Any person who knowingly possesses anhydrous ammonia in a container other than an approved container in violation of KRS 250.489 is guilty of a Class D felony unless it is proven that the person violated KRS 250.489 with the intent to manufacture methamphetamine in violation of KRS 218A.1432, in which case it is a Class B felony for the first offense and a Class A felony for each subsequent offense.

A. Three Classes of Possessors.

The two statutes contemplate three classes of people who might possess anhydrous ammonia in an unapproved container:

- Persons who are laboratory chemists doing legitimate work for the government or a corporation, and those possess the anhydrous solely for agricultural reasons – these people have a complete affirmative defense to possession in an unapproved container; if they prevail on this defense, there will be no penalty whatsoever.
- Persons who possess anhydrous ammonia with the intent to manufacture methamphetamine – these persons are guilty of a Class B felony for the first offense and a Class A felony for the second offense.
- Persons who are neither lab chemists or agriculturists, who possess without intent to manufacture meth – these persons are guilty of a Class D felony.

Why is it okay for a farmer who plans to use the anhydrous solely for an agricultural reason, or a lab chemist working for a pharmaceutical company, immune from prosecution when the ammonia is kept in an "unapproved" (more on that later) container? Obviously, if the legislature considered possession of anhydrous ammonia in an unapproved container to be dangerous, why would it be less dangerous for a farmer or chemist to have? Certainly the argument can be made that a chemist knows what he is doing, and perhaps the farmer also; but if the fear is that anhydrous ammonia may escape from an unapproved container (which could include converted propane tanks, oxygen tanks, fire extinguisher tanks, or glass jars which may or may not be able to hold the

pressure necessary to keep the ammonia a liquid), how is a farmer any more safe than the ordinary citizen? Does a chemist know enough to keep the tank from leaking or exploding? Presumably not.

The legislature's purpose, then, must not have been to protect the handler from an unsafe condition (or else chemists and farmers would be facing liability for creating or maintaining an unsafe condition), but rather to punish only the possessors who possess because of the potential for illicit drug making. The chemist/farmer exemption exists only to ensure that innocent users of anhydrous ammonia do not get wrapped up in a statutory scheme aimed at illegal drug makers.

The issue then becomes: who *are* the members of the Class D felony class, if these people do not have the intent to manufacture methamphetamine. The answer must be those persons who intend to place the anhydrous ammonia into the drug making stream – either on a black market for anhydrous, or in exchange for a finished product of methamphetamine – but do not *themselves* intend to manufacture methamphetamine.

Prosecutors argue both to the judge and jury that – there being no other legitimate reason to have anhydrous ammonia in an unapproved container – the end result must be to manufacture methamphetamine. They further argue that there is no difference between making methamphetamine yourself, and giving it or selling it to someone else who intends to use it to manufacture methamphetamine. A jury will likely go along with this argument.

The problem is that, with that logic, there will *never* be anyone in the third class of persons created by the statutes. Thus, the litigator who tries the possession of anhydrous ammonia case must prepare for a sufficiency-of-the-evidence appeal on this issue. Recently, this lawyer tried just such a case, where not only was there no evidence that any of the defendants were actually intending to manufacture methamphetamine, but the officers admitted that they were aware of no facts with which to charge the B felony other than that they assumed it must be ending up in the hands of a manufacturer at some point. All officers stated that they could not produce evidence beyond a reasonable doubt that these defendants were manufacturing. Moreover, at least one officer admitted that he was aware of some persons who might swap anhydrous ammonia for finished product, and that there may be a black market for the chemical. Nevertheless, the jury convicted upon the prosecution's argument that anyone who possessed anhydrous had to do so knowing the end result would be the manufacture of methamphetamine. Hence, intent was implied. It is hoped that the court of appeals will recognize that to allow a conviction solely on the assumption that anhydrous ammonia will eventually end up with a manufacturer is too eliminate the third class of persons – the Class D felony defendants. The net effect will be to create two classes, not three, in contravention of legislative intent.

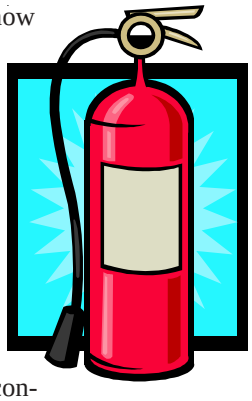
Until the appropriate test case is decided, defense lawyers should challenge the sufficiency of the evidence. Hopefully, the courts will address a properly preserved case where the only evidence of manufacturing is the inference created by the fact of possession. In Section I.D. of this article, jury instructions for both the primary (intent to manufacture) offense, and the lesser, Class D offense, are included.

B. "Unapproved Container"

The statute makes possession of anhydrous ammonia illegal only if it is in an "unapproved container." Thus, the farmer who wishes to supplement his income by manufacturing meth presumably can park his legally purchased tank trailer of anhydrous ammonia in his barn, and use it for meth manufacturing, without worry of being guilty of *this particular statute*. (Of course, there are others out there, if he gets caught). Thus, the issue is: what is an "unapproved container?" Unapproved by *whom?*

The drafters of the statute did not take the time to explain who is the approving authority, assuming (apparently) that it would be evident to everyone who *is t*he approving authority. This lawyer knows of only one entity that issues any kind of rules or regulations concerning the storage of anhydrous ammonia, and that is the Occupational Safety and Health Administration ("OSHA"). Regulations concerning the storage and handling of anhydrous ammonia are codified at 29 C.F.R. Ch. XVII Sect. 1910.111, *et seq.*

[At one time, it was thought prudent by criminal defense lawyers to not write or talk about OSHA regulations, in the hopes that prosecutors, not realizing that "unapproved container" is an element which must be proven at trial, would learn about the regulations, and present them for judicial notice or as an exhibit, and shore up an element that they might otherwise proceed to trial without. I believe that that argument – which is insulting to prosecutors, by the way – is wholly without merit. Every prosecutor I have seen has asked me prior to trial to stipulate to the regulations, or has otherwise supplied them as an exhibit they intend to put before the jury. Prosecutors do, after all, got to "prosecutor school," seminars where they are taught how to try these cases. More common in my practice is the defense lawyer who is not aware of the OSHA regulations. But we digress.]



While there are many specifics governing what is and what is not a proper container approved by OSHA, concerning shape, size and ability to hold up under certain pressures, suffice it to say that any tank without the notation "Anhydrous Ammonia" stamped upon is not an approved con-

Continued on page 6

Continued from page 5

tainer. Without having to go any further, oxygen tanks, propane tanks, fire extinguishers and Mason jars are eliminated immediately. Should the defendant have the foresight (or stupidity) to correctly label the container, the other standards for an approved container are easily proven.

Defense counsel should be aware of these regulations, and object if the prosecution tries to argue "unapproved container" without this authority. Moreover, do not stipulate into evidence the regulations – make the police supply a sponsoring witness. This is because you may be able to use the witness – who obviously must demonstrate some knowledge of storage of anhydrous ammonia – to answer other questions you may have. Plus, the prosecution may not have a sponsoring witness, and you might be able to preclude the regulations – which are quite detailed – from being admitted into evidence by judicial notice or otherwise.

C. Possession

"Possession" is defined by the Penal Code (KRS 500.080(14) as "to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object." Since the Penal Code's definition of "possession" has been interpreted to be applicable to the drug code (see *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky. App. 1992)), it would be expected that the same definition would govern unlawful possession of anhydrous ammonia, even though it is contained in the Agriculture Code, not the Drug Code. That is exactly what happened in the case of *Beaty v. Commonwealth*, 125 S.W.3d 196, 203 (Ky. 2003). In that case, a person was charged with manufacturing methamphetamine, by possessing all of the equipment to manufacture methamphetamine, and with possession of anhydrous ammonia in an unapproved container. In upholding the conviction for both offenses on the "sufficiency-of-the-evidence" appeal point, the court ruled that, since the Appellant was driving the vehicle, he was deemed to have possessed the contraband (relying upon *Leavell v. Commonwealth*, 737 S.W.2d 695, 697 (Ky. 1987) "[t]he person who owns or exercises dominion or control over a motor vehicle in which contraband is concealed, is deemed to possess the contraband.") The court also noted that there was testimony that the anhydrous ammonia could be smelled by anyone in the vehicle.

However, even though *Leavell* and now *Beaty* upheld jury findings of possession and stated that the driver is "deemed" to know of the presence of the contraband, this is not a non-rebuttable presumption. There is a difference between being the sole occupant of a vehicle versus one of many occupants. A jury can believe that a person who is temporarily in control of the vehicle had no actual knowledge of the trunk's contents, if the facts so indicate. In other words, there is no "strict liability" for possession if the defendant is the driver. There is a jury question. Just be forewarned that a jury's finding is unlikely to be overturned on appeal.

Thus, great emphasis must be placed on convincing a jury that the Commonwealth has failed to prove "possession." In that regard, note that the word "actual" appears twice in the definition. The legislature must have intended to emphasize that "dominion" or "control" over an object must be real, and not imaginary or speculative. Argue that "actual" has to mean something, and that it has "raised the bar" for the prosecution.

D. Proof of Anhydrous Nature of the Ammonia

In *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004), the Court explained that a police officer can testify, based on his training and experience, that an odor emanating from a glass jar that had been destroyed prior to testing was that of anhydrous ammonia, and not diluted (aqueous) household ammonia. KRE 701. However, it is still a jury question whether the substance was in fact anhydrous ammonia. In affirming the conviction, the court approved the giving of a missing evidence instruction:

With respect to the fact that the contents of the glass jar were destroyed without testing, the trial judge gave the jury a "missing evidence" instruction that permitted the jury to infer that if the evidence were available, it would be favorable to Appellant's case. *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997).

In *Collins*, the court had held that where a towel allegedly containing semen of a person charged with rape was negligently not collected and examined by the Commonwealth, the missing evidence instruction given to the jury by the trial court was of "critical importance," and turned any "uncertainty as to what the towel might have proved" to the advantage of the defendant.

Hence, it is important for the defense attorney to seek a missing evidence instruction whenever evidence is mistakenly or intentionally destroyed or not collected.

E. Jury Instructions

Instruction No. ___
Unlawful Possession of Anhydrous Ammonia

You will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2004 and before the finding of the indictment herein, Defendant unlawfully possessed anhydrous ammonia in a container other than an approved container; AND

B. That when he did so he intended to manufacture methamphetamine.

For the lesser included Class D offense, simply drop "B" from the instruction.

II. Theft of Anhydrous Ammonia

Theft of Anhydrous Ammonia is the only one of the three offenses that is codified in the Model Penal Code rather than the Agriculture Code. KRS 514.030 provides in pertinent part:

> (1) Except as otherwise provided in KRS 217.181 or 218A.1418, a person is guilty of theft by unlawful taking or disposition when he unlawfully:
> (a) Takes or exercises control over movable property of another with intent to deprive him thereof; of
> (b) Obtains movable property of another with intent to deprive him thereof with intent to benefit himself or another not entitled thereto.
>
> (2) Theft by unlawful taking or disposition is a Class A misdemeanor unless the value of the property is three hundred dollars ($300) or more, in which case it is a Class D felony; or unless;
>
> * * *
>
> (b) The property is anhydrous ammonia (regardless of the value of the ammonia), in which case it is a Class D felony unless it is proven that the person violated this section with the intent to manufacture methamphetamine in violation of KRS 218A.1432, in which case it is a Class B felony for the first offense and a Class A felony for each subsequent offense.

A. Two Classes of Thieves

Unlike possessors, there are only two classes of thieves of anhydrous ammonia: Those who steal with the intent to manufacture methamphetamine and those who do not. Ideologically, it is easier to imagine a thief who steals anhydrous ammonia for the purpose of fertilizing his field or refrigerating his business, than it is to imagine someone who possesses anhydrous in an unapproved container for those purposes. One cannot reasonably use a propane tank full of ammonia to fertilize the field, while one could certainly steal a trailer full of ammonia for that purpose. Nevertheless, where the defendant is stealing the anhydrous and placing it in a container not suitable for any purpose other than delivery into a meth manufacturing system, counsel has to explore the "black market" or swapping defense discussed in Section *I.A.* of this chapter.

B. Theft by Unlawful Taking or Receipt Only

Apparently, theft by unlawful taking is the only way one can be convicted of *theft* of anhydrous ammonia. The other arguably applicable theft statutes – Theft by deception (KRS 514.040), Theft of property lost, mislaid or delivered by mistake (KRS 514.040), Theft by failure to make required disposition of property (KRS 514.070), and Theft by extortion (KRS 514.080), are all silent as to anhydrous ammonia. Thus, theoretically, a farmer or person claiming to be a farmer could write a cold check to a farm supply company for a tank of anhydrous ammonia, haul the tank to an undisclosed location for the purpose of making methamphetamine, and be guilty of neither theft of anhydrous or possession of anhydrous in an unlawful container. (He would still be guilty of theft, of course, and face a Class D felony if the tank and ammonia are valued at over $300.00.)

The Penal Code does, however, preserve the Receipt of Stolen Property offense, where anhydrous ammonia is the property. KRS 514.110(3)(b).

C. Jury Instruction

> Instruction No. ___
> Theft of Anhydrous Ammonia
> With Intention to Make Methamphetamine
>
> You will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about _____, 2004, and before the finding of the indictment herein, Defendant took or exercised control over anhydrous ammonia belonging to (name of person who owned the anhydrous ammonia);
> AND
>
> B. That in so doing, Defendant knew the Anhydrous Ammonia was not his own and that he was not acting under a claim of right to it;
> AND
>
> C. That in so doing, Defendant intended to deprive (name of person who owned the anhydrous ammonia) of the anhydrous ammonia;
> AND
>
> D. That in so doing, Defendant intended to manufacture methamphetamine.
>
> [Eliminate D for the lesser Class D offense.]

C. Lesser Included Offenses

The lesser included offenses for theft do not include the misdemeanor lesser (for value under $300.00, because the statute makes theft of anhydrous a felony regardless of the value. The only issue is whether there is evidence of an intent to manufacture methamphetamine, in which case the felony lesser would be a Class D felony instead of a Class B or A felony. However, there are other lesser included offenses depending upon the facts and the number of persons involved or accused as accomplices.

1. Attempt

Sometimes, the defendant may be caught in the act of trying to transfer anhydrous ammonia from someone's tank into a receptacle of his or her own. In that event, the defendant may have never actually taken or exercised control over an-

Continued on page 8

Continued from page 7

hydrous ammonia. Leaving aside for the moment the fact that he will probably be charged with tampering with anhydrous ammonia equipment, the state may also charge him or her with theft or a lesser included offense of theft, (raising double jeopardy concerns, discussed elsewhere in this chapter).

Attempt will make the A felony a B felony, a B felony a C felony, and the D felony a Class A misdemeanor.

Instruction No. ___
Attempted Theft of Anhydrous Ammonia
With Intent to Manufacture Methamphetamine

If you do not find the Defendant Guilty under Instruction No. __ you will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2004 and before the finding of the indictment herein, Robert Cahill attempted to take or exercise control over Anhydrous Ammonia belonging to (Name of person who owned anhydrous ammonia);
AND
B. That in so doing, Defendant knew the Anhydrous Ammonia was not his own and that he was not acting under a claim of right to it;
AND
C. That in so doing, Defendant intended to deprive (Name of person who owned the anhydrous ammonia) of the Anhydrous Ammonia;
AND
D. That in so doing, Defendant intended to manufacture methamphetamine.

[Eliminate D for the lesser included offense where there is no evidence of an intent to manufacture methamphetamine.]

2. Conspiracy

This is technically not a lesser *included* offense, but is in fact a lesser *different* offense. Nevertheless, the Commonwealth may indict several co-defendants on a theory of complicity, when in fact there has been no aiding and/or abetting by the co-defendants. A conspiracy charge is a C felony where the principal is charged with a B felony theft. (An interesting question occurs where a thief is charged with his second offense of theft of anhydrous ammonia (an A felony), but his co-conspirators are participating in their first ever conspiracy to steal anhydrous ammonia. If convicted of conspiracy, are they facing a C felony or a B felony? The answer should be a C felony, because the theft offense is not an A felony unless and until after conviction it is proven that the particular defendant has a conviction in his past which makes his own penalty enhanceable.)

To prove a conspiracy, the Commonwealth must prove an actual agreement to manufacture, and an overt act on behalf of one or more of the co-conspirators in furtherance of the conspiracy. KRS 506.050.

The Defendant will have a renunciation defense only where the anhydrous was not stolen because of an act of prevention attributable to the defendant.

Instruction No.____
Conspiracy to Theft of Anhydrous Ammonia

If you do not find the Defendant guilty under Instruction No. ____, you will find him guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2004, and before the finding of the indictment herein, Defendant entered into an agreement with Identify Co-defendant(s) to steal anhydrous ammonia, and that if he did so, such action would constitute a substantial step in a course of conduct intended to result in the theft of anhydrous ammonia;
AND
B. That in so doing it was the Defendant's intention that the group of them would manufacture methamphetamine;
AND
C. That pursuant to, in furtherance of, and during the continued existence of such agreement, Defendant and/or Co-Defendant did the following overt act in furtherance of the conspiracy: _____;
AND
D. That Defendant did not thereafter prevent the theft of anhydrous ammonia under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.

[Where there is no evidence of intent to manufacture methamphetamine, simply omit B from the instruction.]

3. Facilitation to Theft of Anhydrous Ammonia

Just as discussed in the "tampering" section of this chapter, the state may charge someone as an accomplice someone who is at the scene, but who did not actually touch the tank, or try to get the anhydrous. Maybe it is a boyfriend who simply drove the car to the field where the tank was, while his girlfriend actually went into the field to steal the anhydrous. More often than not, this lesser included will be sought where the defendant is charged with complicity to theft of anhydrous ammonia.

Distinguish between "facilitation" (KRS 506.080) to theft of anhydrous ammonia and "complicity" (KRS 502.020) to theft of anhydrous ammonia. In both, a defendant must aid and/or abet someone who is charged with stealing anhydrous, the

basic difference being that an accomplice shares in the intention to steal whereas the facilitator knows that the principal is going to steal, but otherwise does not share in the intention to steal. (See *Helton v. Commonwealth*, 244 S.W.2d 762 (Ky. 1951), "to constitute one and aider and abettor he must share the criminal intent or purpose of the principal.")

III. Tampering with Anhydrous Ammonia Equipment

KRS 250.4892 provides that:

(1) It shall be unlawful for any person to tamper with equipment, containers, or facilities used for the storage, handling, transporting, or application of anhydrous ammonia.
(2) Tampering occurs when any person who, having no right to do so, or any reasonable ground to believe that he has the right for a legitimate or legal purpose, transfers or attempts to transfer anhydrous ammonia to another container, or intentionally or wantonly defaces, destroys, or damages the equipment, container, or facility containing anhydrous ammonia.

The penalty for a violation of KRS 250.4892 is contained in KRS 250.991(3):

(3) A violation of KRS 250.4892 is a Class D felony unless it is proven that the person violated KRS 250.4892 with the intent to manufacture methamphetamine in violation of KRS 218A.1432, in which case it is a Class B felony for the first offense and a Class A felony for each subsequent offense.

A. Two Classes of Tamperers

Like the theft offenses, there are two classes of offenders. Those who tamper with the intent to manufacture methamphetamine, and those who tamper without such intent. The only conceivable persons within this second class are those who are tampering with the intent to enter a black market with respect to anhydrous, or those that wish to swap the anhydrous for money or finished product. In either event, the prosecution will argue that there is an intent, ultimately, that methamphetamine be manufactured by *somebody*, so all of the arguments contained in section *I.A.* above are applicable here.

On the other hand, there might actually be a person out there who has absolutely no desire to capture anhydrous for any purpose, but merely desires take a sledge hammer and beat the equipment in order to make sure no one else steals the anhydrous, either. To be actionable, this person would have to be someone other than the owner of the tank or equipment; presumably the owner would not be a person "having no right to do."

B. Lesser Included Offenses

1. Attempt

An attempt instruction for tampering is problematic; generally, it will not be available because of the wording of the statute. For example, if the indictment is alleging tampering based upon the defendant's transfer, or *attempt* to transfer anhydrous ammonia to another container, the offense of "tampering" is complete upon the attempt. As defined, "tampering" includes an attempt to tamper. It is illogical to have the lesser included offense of "attempt" in this instance, because then the jury would be asked to find an attempt to attempt.

If the indictment is based upon the wanton defacing, destroying or damaging of the equipment, container or facility containing anhydrous ammonia, then attempt is not available as a lesser included offense because in Kentucky, there can be not attempt to commit an unintentional act. As the Supreme Court held in *Prince v. Commonwealth*, 987 S.W.2d 324 (Ky. App. 1997), "[t]o be criminally liable for an attempted crime under KRS 506.010, a person must intend to commit the crime and take a substantial step toward the commission of it… Perhaps the most succinct analysis of this situation was expressed by the statement that '[t]here is no such criminal offense as an attempt to achieve an unintended result,'" quoting *People v. Viser*, 343 N.E.2d 903, 910 (Ill. 1975).

Thus, attempt is only going to be available where the indictment charges, or the evidence shows, that the defendant was intentionally going to deface, destroy or damage the anhydrous tanks or equipment, and he fails to do so.

Instruction No. ____
Attempted Tampering of
Anhydrous Ammonia Equipment
With Intent to Manufacture Methamphetamine

If you do not find the Defendant Guilty under Instruction No. __ you will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2004 and before the finding of the indictment herein, Defendant attempted to deface, destroy or damage the equipment, container or facility containing anhydrous ammonia to (Name of person who owned anhydrous ammonia) by (Identify action taken) ; AND
B. That in so doing, Defendant took a substantial step toward tampering with the anhydrous ammonia equipment, container or facility; AND
C. That in so doing, the Defendant knew the Anhydrous Ammonia equipment, container or facility was not his own and that he was not acting under a claim of right to it; AND
D. That in so doing, Defendant intended to manufacture methamphetamine.

[Delete D in the event there is no evidence that the Defendant intended to manufacture methamphetamine.]

Continued on page 10

Continued from page 9

2. Conspiracy and Facilitation

For a discussion as to the applicability of each, see sections *II.C.2-3;* Tampering being analogous to theft, there is relatively little to add here that has not already been said there, and the form jury instructions there can be easily adapted.

IV. Double Jeopardy Issues

As can be seen from the description of the three anhydrous ammonia offense statutes, there is lots of overlap between the offenses. But is there enough overlap to prevent the Commonwealth from seeking indictments of all three offenses, assuming that there are facts in one continuous transaction sufficient to support a conviction of each one of the offenses separately?

Kentucky, in *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996) adopted the "*Blockburger* Test," from *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932):

> If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." … [T]wo different statutes define the "same offense," typically because one is a lesser included offense of the other.

This test was reaffirmed in the case of *Beaty v. Commonwealth, supra,* and applied to the issue of whether the manufacture of methamphetamine and the possession of a controlled substance in the first degree (methamphetamine) (KRS 218A.1415(1)) was a violation double jeopardy, when the methamphetamine is the result of the manufacturing process. The Court held that double jeopardy protections were in fact violated.

But how does the *Blockburger* test apply to the anhydrous ammonia offenses?

A. Possession of Anhydrous & Manufacturing Methamphetamine

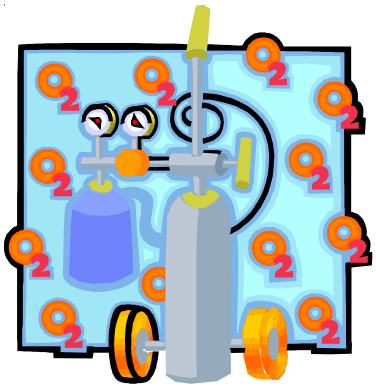
Kotila, supra, held that manufacturing methamphetamine would not preclude a charge of possession of anhydrous ammonia in an unlawful container, because each requires proof of an element the other does not. Where a charge of manufacturing is based upon possession of chemicals, the statute requires possession of ALL of the chemicals, whereas the anhydrous statute requires only possession of the one chemical. Likewise, the anhydrous statute requires possession in an unlawful container, whereas the manufacturing statute makes no reference to containers. Thus, double jeopardy as defined by the *Burge* case does not exist, for now.

B. Possession of Anhydrous & Theft of Anhydrous

The possession statute requires that the anhydrous ammonia be possessed in an unapproved container. The theft statute requires a taking of the anhydrous, or the exercise of control over the anhydrous ammonia, but does not require the use of an unapproved container. Using the logic of *Kotila*, the *Blockburger* test is not satisfied. Although it is difficult to imagine how one could in fact take anhydrous without putting it in an unapproved container, it could certainly be done. One way to accomplish the theft would be to simply take an empty approved container to the sight, and fill it up with anhydrous from the full tank. In that case, there is never going to be a charge of possession in an unapproved container, because the anhydrous remains in the approved container when stolen.

C. Tampering with Anhydrous Equipment & Theft of Anhydrous

This is a different situation altogether. It is impossible to imagine stealing from a container without committing the offense of tampering also. Tampering is defined as the transfer or attempted transfer from one container to the other, and one must exercise control over the anhydrous to do this. Below is a motion, written by Matthew Jaimet, Assistant Public Advocate in the Murray, Kentucky Department of Public Advocacy, which contains the legal authority to make this argument. It is used here by permission of Mr. Jaimet.



D. Form Motion

MOTION TO REQUIRE THE COMMONWEALTH TO ELECT WHICH OFFENSE IT WILL PROSECUTE ON GROUNDS OF MULTIPLICITY AND DOUBLE JEOPARDY

NOW COMES the above named Defendant, and respectfully requests that this Honorable Court enter an Order declaring the Complaint in this matter to be multiplicitous in that, under the circumstances, the offenses of Theft by Unlawful Taking of Anhydrous Ammonia and Tampering with Anhydrous Ammonia Equipment are the same offense. Defendant therefore requests this Court to require the Commonwealth to elect which offense it wishes to dismiss in the above-captioned matter.

Defendant so moves the Court pursuant to the 5th and 14th Amendments to the United States Constitution; Sections 2 and 13 of the Kentucky Constitution; KRS 505.020; and the longstanding and fundamental legal principle that multiplicitous charging instruments are improper**.** In support of this Motion, Defendant states as follows:

I. Facts

Defendant is charged with two felonies: Tampering with Anhydrous Ammonia Equipment with Intent to Manufacture Methamphetamine (Count I) and Theft by Unlawful Taking of Anhydrous Ammonia with Intent to Manufacture Methamphetamine (Count II). Both charges are B felonies, and both charges are based on the same alleged conduct. According to the Bill of Particulars, it has been alleged that the Defendant was caught in the process of transferring anhydrous ammonia from a tank belonging to _____.

II. Multiplicity / Double Jeopardy

The Commonwealth's decision to charge the Defendant with two separate offenses based on the same alleged course of conduct was improper. Because the two offenses charged are legally the same offense, the Complaint in this matter is multiplicitous, and one of the two multiplicitous charges must be dismissed.

Multiplicity is the charging of a single offense in more than one count. The test for whether two counts are multiplicitous is the same as the test for whether two offenses are the same offense for double jeopardy purposes: whether each count requires proof of a fact that the other does not. *Blockburger v. U.S.*, 284 U.S. 299 (1932). "If each count requires proof of facts that the other counts do not require, the offenses are not the same, and the indictment is not multiplicitous." *See* Abramson, *Kentucky Criminal Practice and Procedure 3d Ed*., 1997.

If the Commonwealth is able to meet its burden of proof on the Theft of Anhydrous Ammonia charge, it will have automatically have met its burden of proof on the tampering charge, based on the facts alleged. The proof, with respect to the former charge, will establish that, with an unlawful intent, the Defendant transferred anhydrous ammonia to another container *and thereby exercised control over it* with the intent to manufacture methamphetamine.

A simple table comparing the elements of the two offenses shows that the tampering charge is, under the circumstances, a lesser-included offense of the theft charge. Elements one, three and four of the tampering statute are identical to three of the elements in the theft statute. Element two of the tampering statute offense – the transfer of anhydrous ammonia to another container – will *always* involve taking of anhydrous ammonia, or the exercise of control over anhydrous ammonia. Thus, all four of the elements of the tampering statute are contained in the six elements of the theft statute.

TBUT—ANHYDROUS	TAMPERING—ANHYDROUS
1) Unlawfully	1) Having no legal right to do so
2) Took or exercised control over	2) Transferred or attempted to transfer to another container
3) Anhydrous ammonia	3) Anhydrous ammonia
4) Belonging to another	4) With intent to manufacture methamphetamine
5) With intent to deprive	
6) With intent to manufacture methamphetamine	

Moreover, Kentucky's double jeopardy jurisprudence—embodied in the cases interpreting Section 13 and KRS 505.020—"does not require a strict 'statutory elements approach.'" *Commonwealth v. Day*, 983 S.W.2d 505, 509 (Ky. 1999). "[S]o long as the lesser offense is established by proof of the same or less than all of the facts required to establish the commission of the charged offense," it is a lesser-included offense of the charged offense. *Id.* (citing *Perry v. Commonwealth*, 839 S.W.2d 268, 272 (1992), which held that first-degree assault could be a lesser-included offense of murder even though both were B felonies).

Furthermore, where an offense can be violated by more than one course of conduct, courts will look to the course of conduct a defendant is alleged to have completed in conducting a double jeopardy analysis. *See Taylor v. Commonwealth*, 955 S.W.2d

Continued on page 12

Continued from page 11

355, 358-60 (Ky. 1999). In *Taylor*, the Court held that defendant's convictions for first degree robbery and assault did not violate double jeopardy protections where the robbery prosecution was based on KRS 515.020(1)(b), which required the defendant to have been armed with a deadly weapon, and not on KRS 515.020(1)(a), which would have required the defendant to have caused physical injury to a nonparticipant in the crime. The Court thereby distinguished prior cases where both the robbery and assault convictions where based on physical injury to the victim and the Court had vacated the assault conviction on double jeopardy grounds.

The alleged conduct of the Defendant (transferring anhydrous ammonia from one container to another) is the only conduct at issue here. If the Commonwealth proves that the Defendant engaged in the conduct alleged to constitute Theft by Unlawful Taking of Anhydrous Ammonia with Intent to Manufacture Methamphetimine, it will not have to prove one single additional fact to establish the offense of Tampering with Anhydrous Ammonia Equipment.

Where a charging instrument is multiplicitous, the prosecution must dismiss extraneous counts. The Kentucky Supreme Court has held that Section 13 of the Kentucky Constitution protects criminal defendants against multiplicitous charges. *Stark v. Commonwealth*, 828 S.W.2d 603, 607 (Ky. 1991) overruled on other grounds by *Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996).

In *Stark*, the Court applied the *Ingram* single-impulse rule, which prohibited the Commonwealth from carving two or more offenses out of one transaction as a violation of the double jeopardy protections embodied in Section 13. Specifically, the Court stated that "[t]he present interpretation of Section 13 …, which prohibits an accused from being placed in double jeopardy for the same offense, prohibits the Commonwealth from carving out of one act or transaction two or more offenses." *Id*. Thus, the Court vacated the defendant's conviction on two counts of robbery for robbing a single store—one count for robbing the clerk, Mr. Muth, and one for robbing the store, Sav-a-Step Food Mart.

Yet, the Court did not hold merely that the convictions were improper. Rather, it stated that "[t]he prohibition [of Section 13] extends to **indicting** appellant both for robbery in the first degree of Mr. Muth, individually, and **indicting** appellant for the robbery of Mr. Muth in his counterpart status as Sav-a-Step Food Mart." *Id.* (emphasis added).

While the Kentucky Supreme Court has abandoned the *Ingram* single-impulse test in subsequent cases, the Court's holding that Section 13 protects against multiplicitous indictments is still good law. Therefore, where two offenses that are the same offense for double jeopardy purposes are charged as separate counts based on the same set of facts, the charging of two counts instead of one violates Section 13.

However, because the discretion to file charges and prosecute criminal behavior lies with the Commonwealth, the court may not dismiss any multiplicitous charge it chooses. The appropriate remedy is to require the Commonwealth to elect the offense upon which it will proceed. *See Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992); Godby *v. Commonwealth*, 491 S.W.2d 647 (Ky. 1973); *Eisner v. Commonwealth*, 318 S.W.2d 546 (Ky. 1958).

The prohibition against multiplicitous charging instruments and the requirement of an election appears to be alive and well in the federal courts. *See e.g., U.S. v. Wiehl*, 904 F.Supp. 81, 84-85 (N.D. New York 1995); *Heath v. United States*, 970 F.2d 1397, 1401-02 (5th Cir. 1992).

Furthermore, it is not at all clear that the legislature intended multiple punishments to be imposed based on the same set of facts. The nature of the statutes at issue here would seem to preclude a finding of legislative intent to impose multiple punishments. Punishments must be fixed clearly and without ambiguity and any doubt will be resolved against turning a single transaction into multiple offenses. *Commonwealth v. Grubb*, 862 S.W.2d 883 (Ky. 1993).

The Defendant submits that the new B felony anhydrous ammonia provisions were obviously created to punish thefts and even attempted thefts of anhydrous ammonia (for the purpose of manufacturing methamphetamine) at the same level as manufacturing methamphetamine is punished under KRS 218A.1432 and to make the Commonwealth's burden of proof lighter by creating grounds for a B felony charge whenever a person is caught at any step in the process of stealing anhydrous ammonia for the purpose of manufacturing methamphetamine.

Thus, whether a person stealing anhydrous is caught preparing to transfer anhydrous from one tank to another; in the act of transferring it from one tank to another; or carrying stolen anhydrous in an improper container several miles away from the site of a theft; the intent of the legislature seems to have been that such a person be subject to punishment as a B felon for a first offense (and not an A felon).

WHEREFORE, the Defendant respectfully requests that this Honorable Court issue an Order declaring that the Complaint in the above-captioned matter is multiplicitous and requiring the Commonwealth to elect which offense it will dismiss.

Respectfully Submitted,
Attorney of Record ■

ONE OF THE FINEST — REMEMBERING THE LIFE OF COLONEL PAUL G. TOBIN

Col. Paul G. Tobin, the first director of Jefferson County's public defender program and a former President of the Louisville Bar Association, died on June 23rd at the age of 84.

Tobin was a veteran of three wars as a member of the armored cavalry and the Office of the Judge Advocate General. During the Vietnam conflict, he served as Chief Military Trial Judge for all Army commands west of the 180th meridian, including Southeast Asia. He was the only military judge in history to be wounded by enemy fire while conducting a trial. He received numerous military honors, including the Legion of Merit with cluster, Bronze Star, Commendation Medal with cluster and the Purple Heart. Among the many important assignments he undertook during his illustrious military career, none was more interesting than his term as Governor of Spandau, the military prison in Berlin in which the Allies held the most infamous Nazi war criminals, including Albert Speer and Rudolph Hess. Tobin retired as a Colonel after 34 years in the Army before accepting the position as Executive Director of the Louisville-Jefferson County Public Defender Corporation in 1972.

"Colonel Tobin was a true pioneer in the public defender movement in Kentucky, as well as the rest of the country, following the U.S. Supreme Court's decisions in *Gideon* and *Argersinger*," said Dan Goyette, Chief Public Defender. Tobin hired Goyette in 1974, and he succeeded Tobin in 1982. "The Colonel's commitment to equal justice, and his exceptional legal and leadership abilities, are largely responsible for the quality and success of the public defender system in Kentucky today," stated Goyette.

The Louisville-Jefferson County Public Defender program was the first staffed public defender office in the state. Its attorneys have always worked full-time as defenders and focused exclusively on the professional representation of clients from the initiation of criminal charges against them until final disposition of their cases. From the beginning, Tobin said the major objective of the office was to provide "a vigorous, aggressive defense of the indigent accused," according to a 1972 interview in *The Courier-Journal*. "We will handle the case just as if the defendant had hired the best law firm in town," Tobin promised. And, based upon the numerous courtroom victories and national awards the office has achieved in the ensuing 33 years since that interview, it is apparent that Tobin and those who followed him made good on his promise. According to Charlie Ricketts, former LBA President, "As a result of what Paul Tobin did with that office, when you're represented by a public defender in this town, you're getting the best."

Bob Ewald, a member of the firm then known as *Wyatt, Grafton & Sloss*, led the national search for a director of the fledgling program after incorporating the defender organization in 1971 with a group of several other LBA members and securing a federal grant for its first year of operation. Now President-elect of the Kentucky Bar Association, Ewald says that Tobin "changed the way criminal law was practiced in Jefferson County." Circuit Court Judge Geoffrey Morris agrees. "He changed the landscape of criminal defense practice in the early 1970's, and he also started the careers of many of the key players in the justice system today," said Morris, who is one of several sitting judges who worked for Tobin.

Colonel Paul G. Tobin

Goyette noted that Tobin's commitment to the public defender program never waned. "He served on our board of directors from the day of his retirement until the day of his death, and he never missed a meeting in those 23 years," said Goyette. "We will miss him very much, both personally and professionally. He was, quite simply, one of the finest men and lawyers I've ever known."

Tobin was admitted to practice before the U.S. Supreme Court and Court of Military Appeals. He was a member of the Kentucky and Wyoming Bar Associations. He served as a member of the Kentucky Continuing Legal Education Commission and the KBA House of Delegates. He was a former chair of the Kentucky Prepaid Legal Service and was a member of the Kentucky Public Advocacy Commission. He was a Life Fellow of the American Bar Foundation and served in the ABA House of Delegates.

Tobin was elected President of the Louisville Bar Association in 1982 and was a founder and Fellow of the Louisville Bar Foundation. He was named "Lawyer of the Year" in 1976 by the LBA and, in 1985, he received its Distinguished Service Award.

The LBA extends its heartfelt sympathy to his widow, Ruth Duncan Tobin, a past President of the Louisville Bar Auxiliary, as well as to the rest of the Tobin family.

[Editor's Note: In addition to his other public service achievements and awards, Col. Tobin served as one of the early members of the Public Advocacy Commission and was the recipient of DPA's 1998 Nelson Mandela Lifetime Achievement Award.]

Reprinted with the permission of the Louisville Bar Association. ■

EXONERATION

by Margaret Case, Education and Strategic Planning Branch

Criminal case exonerations fill the headlines. We in the criminal justice community have become familiar with the stories of individual inmates released after long years behind bars for crimes they did not commit — like William Gregory, Larry Osborne, and Rolando Cruz. The saga of Bryan Stevenson's efforts at exonerating Walter McMillian in Alabama became Pete Earley's real-life crime thriller, *Circumstantial Evidence*, (an award-winning must-read for any defense lawyer who might harbor the notion that post-conviction litigation is boring).

As the individual exonerations have become more numerous, researchers and writers have started analyzing this set of cases, looking for trends and patterns, and publishing their findings. Earlier this year, the Northwestern University School of Law published "Exonerations in the United States 1989 through 2003," 95 J.Crim.L. & Criminology 523 (2005).

Authors Gross, Jacoby, Matheson, Montgomery, and Patil brought to this study a combined expertise in law, public policy, and statistical research. Their stated purpose was to look at overall patterns, in hopes of learning "about the causes of false convictions and about the operation of our criminal justice system in general."

Definition of an "Exoneration"

What is an "exoneration?" The authors define it as "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted." They examined:

- 42 executive pardons that were based on evidence of innocence,
- 263 court dismissals of charges after new evidence of innocence emerged (often DNA evidence),
- 31 retrial acquittals based on evidence that the defendants had no roles in the crimes,

  and
- 4 posthumous acknowledgements of innocent defendants who had already died in prison.

This definition purposely omits several categories of cases:

- mass exonerations, such as the scores of people who were framed by activities of the Los Angeles Police Department's Rampart division,
- cases involving comparatively light sentences, where either the defendant serves out the sentence before exoneration would be possible and/or where nobody is interested in scrutinizing for the possibility of a false conviction,
- cases in which there is serious doubt whether any crime happened at all, such as the mass sex abuse and satanic ritual cases involving childcare facilities in the 80s and 90s,

  and
- cases which would be exonerations, but for some state action peculiar to the case. This last category would include, for example, the Texas case where the prosecutor agrees that the prisoner should be pardoned because of DNA evidence, but the prosecutor refuses to say that the pardon should be "based on innocence", because that might subject the state to liability for wrongful imprisonment.

The exonerated defendants, from the cases that were included in this study, had spent an average of more than ten years in prison before they were exonerated. Eighty percent of them had been incarcerated for at least five years.

Rape and Murder are the Predominant Crimes

According to the report, a full 96% of these exonerations occurred in just two classes of cases: those involving murder and those involving rape or sexual assault. And this is true even though inmates serving time for those crimes are but a very small part of the total prison population.

The authors attribute the great number of rape exonerations to the increasing availability of DNA testing. They suggest that the high rate of murder exonerations can be attributed to a combination of factors, including (a) the lack of a surviving victim, making crime-solving more difficult and making reliance on snitches more prevalent, (b) extraordinary pressures on law enforcement to secure convictions, (c) high stakes, prompting the real killers to frame innocent "fall guys," and (d) the fact that death sentences get extraordinary scrutiny in post-conviction proceedings, while less-than-death sentences do not.

Troubling Implications for Criminal Justice in General

The large number of rape exonerations carries troubling implications for the larger class of all criminal defendants. As the report points out, there are classes of cases with very

similar characteristics to rape cases, but where DNA testing is not available. The most notable example is robbery cases. Like rapes, robberies are crimes of violence in which the perpetrator is often a stranger to the victim, meaning they are susceptible to eyewitness misidentification.

Robbery arrests can outnumber rape arrests by almost four-to-one. But, the possibility of DNA testing is extremely rare in robbery cases, and robberies were virtually absent from the list of exoneration cases.

So, the report asks: How many false convictions for robbery and other crimes go undetected because there is simply no technique, such as DNA, available to detect them?

In the non-DNA context, most exonerations come in murder and "non-negligent homicide" cases, although such inmates constitute only about 13% of state prisoners. Having already noted that it is the death penalty cases that get the most attention, and that inmates with sentences as high as life in prison do not get the same scrutiny, the study asks the rhetorical question**: "How many additional hundreds or thousands of false convictions would we have discovered if we had worked just as hard to find them among non-capital murders, or among non-homicidal felonies**?"

Forty-three percent of all the exonerations in the study were in cases involving some form of perjury. Fifteen percent involved false confessions.

The Factor of Race

Although 58% of rape prisoners are white, 64% of the exonerated rape prisoners were black and 7% were Hispanic. The study's authors suggest that the reason for blacks being so greatly over-represented among those falsely convicted of rape is probably the race of the victims. "Virtually all of the inter-racial rape convictions in our data were based, at least in part, on eyewitness misidentifications, and one of the strongest findings of systematic studies of eyewitness evidence is that white Americans are much more likely to mistake one black person for another than to do the same for members of their own race."

Another disturbing finding was that over 90% of exonerated defendants who were under the age of 18 at the time of arrest were black or Hispanic, even though a majority of teenagers arrested for the same crimes were white. This disparity is attributed to the fact that white teenagers who are arrested are less likely than blacks to be prosecuted in juvenile court, and white teenagers who are prosecuted are less likely to be taken to felony court and treated as adults.

Conclusion

In this one study, rape and murder were used as two "windows" through which to look into the broader system of criminal justice. As more and more exonerations occur, the universe of cases to be studied will continue to grow, and perhaps our society's ability to dispense true justice can grow by learning from, and acting upon, the results. ■

GED Eligibility Requirements
by BJ Helton

Many district and circuit judges utilize the alternative sentencing statute, KRS 533.200, to divert offenders to a program leading to a GED. There are national and state jurisdictional standards for the GED Tests. The national standards are set by GED Testing Service, an agency of the American Council on Education. A person with a high school diploma is not eligible to take the GED Tests. GED Testing Service requires a person to be 16 years of age and not enrolled in secondary school unless the school district has an approved GED Secondary Program.

The Kentucky GED eligibility requirements are contained in 785 KAR 1:130. These requirements were recently amended. Kentucky Adult Education is providing a summary of the amendment changes to use in your sentencing deliberations.

General Requirements:
An individual at least nineteen years of age with a Kentucky address is eligible to take the GED.
An individual at least sixteen years of age with a Kentucky address is eligible to take the GED if the person has been officially withdrawn from school for 90 days.
Candidates must take and pass the Official Practice Test before registering for the GED Tests.

In considering alternative sentencing to an educational program, the person's initial assessment will determine the length of time required to make sufficient progress to take and pass the GED. You may want to discuss the student's initial assessment with the educational provider before setting a specific date by which the GED must be obtained. You may also request attendance reports and receive periodic progress reports rather than setting a specific date by which the GED must be obtained.

If you have any questions concerning the GED testing process or the eligibility regulation, please email: bj.helton@ky.gov.

An Open Letter To Kentucky's Public Defenders

July 21, 2005

My Friends:

Some of you already know that, starting in August, I will become Minnesota's newest public defender and it's newest Managing Attorney, as I am leaving my private practice of criminal defense law to join Fred Friedman and many other good folks in the Duluth office of the Minnesota public defender system. Many of you did not know that I was leaving, and with my sincere apologies, will have to consider this your, rather late, notice.

I apologize for the generic nature of this note and hope that can be forgiven, as well. I wanted to drop each of you a separate note to talk about our times together and to wish each of you well. However, time was against me and it took so much longer to wrap-up my law practice than I thought it would. So, I am confined by time to writing this one letter that will have to say all I need to say, and hope that each of you will find the part that pertains to you.

I suppose that the best way to start is to make sure that I am cognizant of primacy. I have never met, or been more proud to associate with, a group of people who are more honorable, kind-hearted, and giving of spirit than you. My life has been enriched by being brothers with some of you, friends with others, and simply associated with the rest. You have made my journey over the last fifteen years, on this path that I am about to step off of, the most professionally and personally rewarding of my entire life. You are an incredible group of people and I am honored that you have accepted me into your ranks, your lives, and your hearts. Thank you from the very center of my being and from the very depths of my soul.

In looking back over the last decade and a half, I cannot imagine being the person I have become without your help and friendship. I certainly would not be nearly the lawyer I am without having you there to support me.

I look forward to the years ahead and know that you have given me insights on how I might be better able to do my job and to encourage others to do theirs. I will remember the lessons I have learned watching those considered to be "the wretched refuse of humanity" be tended to by the folks in Somerset. Each of you knows how much I hold you in my heart. Jim, yours is the heart of a lion and the soul of a lamb. You are the quintessential public defender.

I have learned something of patience from Teresa, Audrey, and Lynda. I have tried to understand and emulate the passion I have seen in George and Betty and the other Capital Branch folks; some of whom are still there, and some of whom have left. We have saved a lot of lives together. You will continue to do so.

I have learned the value of scholarship from Glen, Rob, Ed , and so many others who have helped me understand the constantly changing and challenging issues that we face in this profession by writing articles for *The Advocate*. Warriors need to understand the context in which the war is being fought, and scholarship is a large part of that understanding.

I have learned the value of perseverance in watching and learning with the appellate and post-conviction folks. My eyes were very much opened in late March of this year when we spent some time together in Frankfort. My gratitude is so very inconsequential compared to what Euva, Brian, Tim, and all of the rest of you showed me about another aspect of this business that I neither understood nor knew enough about to know that I did not understand.

I wish I could have been paired with more of you to try cases. I thoroughly enjoyed the cases I did try with Margaret, Mark (who's now a prosecutor), Mike, and Stefanie. In the middle of the Culture of Death, we saved some lives. I am no more proud of any case in my career than I am of the results in those cases.

But, perhaps most importantly, through my association with you, I have also been to the mountain and I have been blessed to have seen your future. I have seen the faces of the public advocacy of the times to come, and I know that all will be well within this profession because these people have entered it through the doors of commitment, dedication, and compassion. Potential is a great asset, and more often, a greater burden. But, Andrea, Ashley, Emma, and Monica, as well as so many others, are so filled to the brim with ability that the challenge for the DPA of the future will be to keep these people within the ranks of the DPA once their reputations for excellence and success start to grow exponentially. And it will not be long before that begins to happen.

I wish I could go on and talk about so many others who have graced my life by sharing a beer, a story or a laugh with me over the years at Faubush. I am always so amazed by the power of the collective mind and the magic that can be achieved on that hallowed ground; in the remoteness of

rural Wayne County. I hope to see many of you there again, in October.

You must realize that all of you are so very blessed. I know that it is hard to see yourselves that way. You are put upon by the capriciousness of nearly everyone in the criminal justice system. You are treated poorly. You are expected to just keep handling more and more cases when all of you know that you cannot keep doing so. You are called public "pretenders" and subjected to comments about not being real lawyers. You are tired of it, burned out, and sick of hearing it. No one can fault you for feeling that way. But, through all of that, you are still blessed.

You are blessed because, though your clients may be poor in spirit, you hunger and thirst for righteousness. You shall both be filled. You are the merciful and you the peacemakers. You shall be known as the sons and daughters of the Allfather because of the love you share. You defend those who are persecuted and those who are reviled. You shall find your reward in the arms of the Goddess. It is a faith that I have in the collective "us" and in the Karma of the Universe that makes me so sure of what I believe. And, what I believe is, that you are blessed because you are the ones who walk with the Angels.

I feel like I have finally earned the right to do what you are doing, and to join you in being blessed, and I intend to try my best to do what you do, just as well as you. I ask only for your best wishes and your prayers.

I know that there are many of you whom I have forgotten to mention. I mean no slight and I mean no disrespect. You know who you are and I want you to know, too, that you are in my thoughts and my prayers. I wish you every good thing the Universe has to offer and every success the world might ante-up. I wish you peace and joy and more *Not Guilty* verdicts than you ever thought possible.

And, having said all of that, let me close with a blessing:

Hold on to what is good,
even if it is a handful of earth.
Hold on to what you believe,
even if it is a tree that stands by itself.
Hold on to what you must do,
even if it is a long way from here.
Hold on to life,
even when it is easier letting go.
And, hold on to my hand,
even when I have gone far from you.

I remain a brother-in-arms, and in friendship, I am,

Very truly yours,

MARK J. STANZIANO
Attorney at Law ■

In ineffective assistance of counsel cases, the United States Supreme Court continues to point to the ABA Standards for Criminal Justice, as well as the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, as guides to use in determining what actions by defense counsel are reasonable. In *Rompilla v. Beard*, 125 S.Ct. 2456 (decided June 20, 2005), the Court cited both the 1982 ABA standards, (in effect at the time of Rompilla's 1988 trial), and the current standards. In both death and non-death cases, the ABA Standards and Guidelines are a powerful resource for defenders to use — as checklists for themselves and as authority to cite in seeking the time and court-ordered resources necessary for a competent defense.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases:
http://www.abanet.org/deathpenalty/guidelines.pdf

ABA Standards for Criminal Justice:
http://www.abanet.org/crimjust/standards/home.html

UNPUBLISHED OPINIONS

by Justice Martin E. Johnstone

There seems to be a growing trend toward citing to unpublished cases. Recently, the LBA Communications Committee asked Justice Johnstone to explain the Kentucky Supreme Court's policies regarding publishing opinions and the prohibition against citing to unpublished cases. We want to thank him for sharing the following with us.

Limiting the Number of Cases That Are Published

In 1964, the Judicial Conference began urging judges to limit published decisions to those that set precedent. By 1974, most circuits had set rules in place to limit the number of published opinions. These rules were designed to support the legal system in two ways.

First, courts have finite resources. The necessity to publish all decisions would stretch resources to the breaking point and could impact the quality of written decisions on cases of importance to the legal system. (See Unpublished Opinions, Atkinson • Baker, http://www.depo.com/unpublishedopinions.htm)

More importantly, however, the courts do not publish everything to avoid inundating the law with cases that must be reviewed, cited, and included in briefs. If a decision does not break new ground or have other public/legal significance, why shouldn't briefs cite to the cases that originally decided that point?

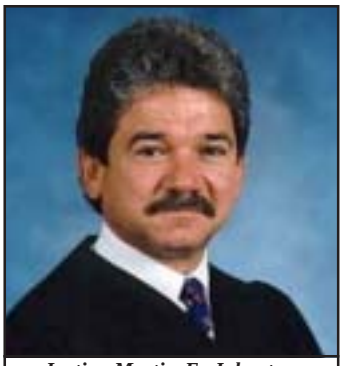
In the past, researching all cases would have required poring through thousands of printed volumes. As the number of published cases increased, the time and money attorneys needed to research cases increased, and in turn, this impacted the cost of legal services for clients.

In addition, attorneys have been prohibited from citing to unpublished opinions in part to avoid any suggestion that attorneys with better connections to the courts could have access to collections of unpublished opinions, and, consequently, have an unfair advantage over their peers.

Changes in Technology

Changes in communications and technology have made even unpublished decisions available for review and accessible to the public through the Court's Web site. This has led to less concerns regarding cost of and access to these decisions in the research process.

It has also alleviated concerns that unpublished decisions are in some way secret or hold some hidden agenda. While technology has not reduced the time and care that a published opinion requires, it has made access to even unpublished opinions more efficient and universal.



Justice Martin E. Johnstone

These changes in technology have fueled a growing trend toward allowing briefs to cite to all cases. In 2003, nine of 13 federal circuits allowed citation to unpublished decisions. In addition, while 25 states prohibit citations, 21 now allow citation in some capacity. (See Stephen R. Barnett, No-Citation Rules Under Siege: A Battlefield Report and Analysis, Journal of Appellate Practice and Process, vol. 5, No. 2, Fall 2003.)

In preparing to answer your question, I have given serious thought to the rule prohibiting citation of unpublished cases in Kentucky. Based on the national trend toward permitting the citation of unpublished decisions and discussion within our community, I plan to present a recommendation to the Kentucky Supreme Court to amend the rules to allow citation to unpublished decisions for persuasive value.

Martin E. Johnstone is the associate chief justice of the Supreme Court of Kentucky.

Reprinted with permission from the August 2005 Bar Briefs.
www.loubar.org ■

Criteria for Published Opinions

There are five criteria originally created by the Appeals Court used to determine publication. While it is true that the following criteria are somewhat subjective, they do offer the Court guidance in identifying cases that will be of later value to the legal system.

- The opinion establishes a new rule of law or alters or modifies an existing rule or applies an established rule to a novel fact situation.
- The opinion involves an issue of continuing public interest.
- The opinion involves an issue of continuing interest to the state judiciary and the practicing bar.
- The opinion criticizes existing law.
- The opinion resolves an apparent conflict of authority.

CAPITAL CASE REVIEW

by David M. Barron, Capital Post-Conviction

David Barron

U.S. Supreme Court

***Lovitt v. True*,**
2005 WL 1607725
(U.S. July 11, 2005)

The execution date was set for capital defendant before the expiration of the time period for filing a *cert.* petition from denial of *habeas relief*, the U. S. Supreme Court granted a stay of execution pending disposition of the *cert*. petition.

The Court is considering the following questions:

1. Whether the Court of Appeals for the Fourth Circuit should be reversed for repeating its error in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), of upholding a death sentence where defense counsel conducted little investigation of their client's background and failed to uncover and present to the jury extensive evidence of childhood abuse.

2. Whether, in light of the fact that DNA evidence has exonerated more than a dozen individuals on death row, the Court of Appeals erred in holding that *Youngblood v. Arizona*, 488 U.S. 51 (1988), permits a Commonwealth employee to destroy DNA evidence deliberately, unlawfully, and in reckless disregard of the petitioner's rights, before post-conviction proceedings have commenced.

3. Whether the Court of Appeals correctly held, in agreement with five circuits but in conflict with three others, that the prosecution had no duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose the medical examiner's exculpatory opinion because defense counsel purportedly could have discovered the examiner's opinion on cross-examination.

***Bell v. Abdur'Rahman*,**
125 S.Ct. 2991 (2005)

The Court granted *certiorari* in the leading Sixth Circuit case on the application of Federal Rule of Civil Procedure, Rule 60(b) as it applies to reopening *habeas* proceedings, summarily vacated the judgment, and remanded for further consideration in light of *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005). Succinctly, the Sixth Circuit, in Abdur'Rahman, had held that a motion filed under 60(b) should be treated as a 60(b) motion rather than a *habeas* petition if the motion attacks a defect in the *habeas* proceeding not the merits of the underlying claim. In accord with that, the Sixth Circuit remanded for further consideration without addressing whether Abdur'Rahman's claim was an "extraordinary circumstance" justifying reopening habeas proceeding.

In *Gonzalez*, the Court agreed with the Sixth Circuit's interpretation of 60(b), holding that a Federal Rules of Civil Procedure, Rule 60(b) motion attacks some defect in the integrity of the federal *habeas* proceedings, not the substance of the federal court's resolution of a claim on the merits. Thus, when no "claim" is presented, there is no basis for contending that the Rule 60 (b) motion should be treated like a *habeas corpus* application. If the motion itself fails to substantively address federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as a 60(b) motion creates no inconsistency with the *habeas* statute or rules. A 60(b) motion addressing the applicable statute of limitations falls within this ambit. But, according to the Court, a change in law or the Court arriving at a different interpretation of law is hardly an extraordinary circumstance justifying relief under 60(b)(6), which does not have a one-year statute of limitations.

***Kandies v. Polk*,**
125 S.Ct. 2974 (2005)

Certiorari granted, judgment summarily vacated, and remanded for further consideration in light of *Miller-El v. Dretke*, 125 S.Ct. 2317 (June 13, 2005).

***Snyder v. Louisiana*,**
125 S.Ct. 2956 (2005)

Certiorari granted, judgment summarily vacated, and remanded for further consideration in light of *Miller-El v. Dretke*, 125 S.Ct. 2317 (June 13, 2005).

***Bell v. Thompson*,**
125 S.Ct. 2825 (2005)
(Kennedy, J., for the Court; Breyer, J., dissenting, joined by Stevens, J., Souter, J., and Ginsburg, J.)

In this case, the US Supreme Court reversed the Sixth Circuit. Five months after the US Supreme Court denied a petition for rehearing of the denial of *certiorari*, the U.S. Court of Appeals for the Sixth Circuit *sua sponte* amended its opinion denying federal *habeas* relief, after reviewing a mental health expert's deposition, which was not included in the record before the federal district court. The new opinion

Continued on page 20

Continued from page 19

vacated the district court's judgment and remanded for an evidentiary hearing on an ineffective assistance of counsel claim relying on that mental health expert's deposition. The Sixth Circuit, however, neither issued an order recalling or staying the mandate, which, under Federal Rules of Appellate Procedure, Rule 41, must issue immediately when a copy of the United States Supreme Court order denying the petition for a writ of *certiorari* is filed. Instead, the Sixth Circuit relied on its inherent authority to reconsider its opinion prior to the issuance of the mandate. The United States Supreme Court granted *certiorari* to address the scope of a federal court's authority to withhold its mandate under F.R.A.P. 41. The Court, however, did not address this issue, instead, holding that, assuming that F.R.A.P. 41 authorizes a stay of the mandate following the denial of *certiorari* and also that a court may stay the mandate without entering an order, the Sixth Circuit abused its discretion doing so here because it waited five months after *certiorari* was denied to issue its amended opinion.

Can a federal court of appeals stay its mandate through mere inaction? The Court refused to resolve the open question of "whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction."

Can a court stay the mandate after *certiorari* is denied? The Court assumed that F.R.A.P. 41 authorizes a court to stay the mandate after certiorari is denied, but stated that "the circumstances where such a stay would be warranted are rare."

The Sixth Circuit abused its discretion by withholding the mandate: A court's discretion to withhold, stay, or recall a mandate "must be exercised in a way that is consistent with the State's interest in the finality of convictions that have survived direct review within the state court system." By withholding the mandate for months - - without issuing an order that it was staying or withholding the mandate - - while the State prepared to carry out Thompson's sentence, the Sixth Circuit abused its discretion by not according the appropriate level of respect to the state court's judgment.

Miscarriage of justice exception is limited when applied to the sentencing phase: Only evidence that affects a defendant's eligibility for the death penalty can support a miscarriage of justice claim in the capital sentencing context. Additional mitigating evidence that was not presented at trial cannot be the basis for a miscarriage of justice claim.

Author's note: This is an extremely narrow opinion, in which the Court does not address the scope of F.R.A.P. 41. With different facts, the outcome of this case may have been different. Capital counsel should cite to this opinion in support of a circuit court of appeals Rule 41 authority to withhold/stay a mandate after *certiorari* is denied and for its inherent authority to revise its opinion before the mandate issues, both of which the Court assumed to be permissible.

Halbert v. Michigan,
125 S.Ct. 2582 (2005)
(Ginsburg, J., for the Court; Thomas, J., dissenting, joined by Scalia, J.)

In this non-capital case, the Court held that the Due Process and Equal Protection clauses require appointment of counsel for indigent defendants who seek access to first-tier review, even where such review is discretionary under state law. First-tier review is an appeal where the claims have not been presented by a lawyer and passed upon by an appellate court.

Author's note: Halbert should be used to argue that there is a constitutional right to the effective assistance of post conviction counsel since, in most states, it is the first opportunity to assert trial counsel's ineffectiveness, and other non-record issues. *See Evitts v. Lucey*, 469 U.S. 387 (1985) (holding that a constitutional right to counsel necessarily includes a constitutional right to the effective assistance of counsel).

Mayle v. Felix,
125 S.Ct. 2562 (2005)
(Ginsburg, J., for the Court; Souter, J., dissenting, joined by Stevens, J., dissenting)

In this non-capital case, the Court held that, in the context of a *habeas* petition, "same transaction and occurrence" for relation back (statute of limitations) under Federal Rules of Civil Procedure, Rule 15, does not mean "arose from the same trial and conviction." Thus, an amended *habeas* petition does not relate back to the date the original *habeas* was filed when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.

Author's note: The Court held that a new ground for relief does not relate back when the facts differ in "both time and type." The conjunctive is important. Arguably, the new ground for relief relates back if it differs in either time OR type, but not both.

Hightower v. Schofield,
125 S.Ct. 2529 (2005)

Certiorari granted, judgment summarily vacated, and remanded for further consideration in light of *Miller-El v. Dretke*, 125 S.Ct. 2317 (June 13, 2005). The case involves disparate questioning of jurors based on race, and prosecution tactics to prevent African-Americans from being on the jury pool.

Dodd v. United States,
125 S.Ct. 2478 (2005)
(O'Connor, J., for the Court; Stevens, J., dissenting, joined by Souter, J., Breyer, J., and Ginsburg, J.)

In this non-capital case, the Court held that the Anti-Terrorism and Effective Death Penalty Act's one-year statute of limitations for filing a federal *habeas* petition begins to run on the date on which the United States Supreme Court "initially recognized" the right asserted in an applicant's motion, not the date on which that right was made retroactive.

Rompilla v. Beard,
125 S.Ct. 2456 (2005)
(Souter, J., for the Court; Kennedy, J., dissenting, joined by Rehnquist, J., Scalia, J., and Thomas, J.)

At trial, the prosecution informed defense counsel that it planned to introduce Rompilla's history of prior convictions and prove a prior conviction for rape and assault as an aggravator. Trial counsel failed to review the case file for this similar offense, yet presented residual doubt as the main mitigating evidence. In determining whether this constitutes deficient performance, the Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." Thus, the Court granted Rompilla a new sentencing phase.

***De novo* review applies when a state court fails to address an issue in its entirety, and to a prong of a standard that is not addressed by the state court:** In addressing whether Rompilla was prejudiced by counsel's deficient performance, the Court examined the prejudice prong of Rompilla's ineffective assistance of counsel claim *de novo* because the state court never reached the issue of prejudice.

Author's note: Habeas counsel should always look for every opportunity to argue that *de novo* review should apply rather than the AEDPA's limitation on relief standard. *Rompilla* provides another opportunity to do so. If a court denies a claim for failing to satisfy one part of the claim, any review of the rest of the claim conducted by a higher court should be *de novo*. Because *Rompilla* overrules Sixth Circuit law on this issue, a Federal Rules of Civil Procedure, Rule 60(b) motion likely is cognizable in almost every federal *habeas* case originating in Kentucky, Michigan, Ohio, or Tennessee.[1]

Counsel's failure to obtain a prior conviction file falls below the level of reasonable performance: The court noted that "it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation." Reasonable efforts by defense

"[a] lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial."
-- Rompilla v. Beard

counsel are discussed in the American Bar Association Standards for Criminal Justice. Applying those standards here, the court held that counsel was obligated:

> to obtain the Commonwealth's readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond hope.
>
> No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony. Nor would a reasonable lawyer compare possible searches for school reports, juvenile records, and evidence of drinking habits to the opportunity to take a look at a file disclosing what the prosecutor knows and even plans to read from in his case . . . looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce.
>
> The unreasonableness of attempting no more than [counsel] did was heightened by the easy availability of the file at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt. It is owing to these circumstances that the state courts were objectively unreasonable in concluding that counsel could reasonably decline to make any effort to review the file.

Author's note: Residual doubt was at the heart of Rompilla's mitigation defense at trial, and is refer-

Continued on page 22

Continued from page 21

enced throughout the Court's opinion. Without addressing whether residual doubt constitutes a valid mitigating factor, whether it can be presented at the sentencing phase, or whether it can be argued by defense counsel, the Court found that counsel was deficient for not reviewing the case file of Rompilla's prior conviction, in part, because it hamstrung counsel's chosen defense of residual doubt. To reach this conclusion, the Court implicitly recognized that residual doubt evidence and argument is proper mitigating evidence at the sentencing phase of a capital case. This issue is before the Court in *Oregon v. Guzek*, No. 04-928 (cert. grant, 4/25/05), which is scheduled to be argued on December 7, 2005.

Defense counsel's knowledge that the prior conviction would be used at trial is essential: The court noted that counsel may not be deficient in not reviewing a client's case file for a prior offense when the defense lawyer is not charged with knowledge that the prosecutor intends to use the prior conviction as an aggravating factor.

Rompilla was prejudiced by counsel's failure to review the prior conviction file the prosecution used as evidence of an aggravating circumstance: If defense counsel had looked at the case file from Rompilla's prior offense, counsel would have found mitigating evidence that counsel had not already discovered despite asking three mental health experts to look into Rompilla's mental state at the time, talking to five members of Rompilla's family, and talking to Rompilla, who indicated his childhood and schooling had been normal. This evidence included: 1) that Rompilla grew up in a slum environment; 2) that Rompilla overindulged in alcoholic beverages; 3) that Rompilla was regularly incarcerated, starting at age 16; 4) test results indicating that Rompilla suffered from schizophrenia and other disorders; and, 5) test scores showing a third grade level of cognition after nine years of schooling. "With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case." Further investigation likely would have revealed that: 1) Rompilla's mother drank alcohol during his pregnancy; 2) Rompilla's father viciously beat Rompilla's mother; 3) Rompilla's mother stabbed his father; 4) Rompilla's father beat him with fists, leather straps, belts, and sticks; 5) Rompilla received no expressions of parental love, affection, or approval; 6) Rompilla's father locked him in a wire mesh dog pen that was filthy and excrement filled; 7) Rompilla had an isolated childhood, and was not allowed to visit other children or to speak to anyone on the phone; 8) Rompilla grew up in a home without indoor plumbing, and had to sleep in the attic with no heat; 9) Rompilla was given no clothes and had to attend school in rags; 10) school records showing that Rompilla's I.Q. was in the mentally retarded range; and, 11) Rompilla suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions, which likely resulted from fetal alcohol syndrome.

The cumulative effect of this evidence "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury . . . . [I]t goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability." Thus, the likelihood of a different result is sufficient to undermine confidence in the outcome reached at the sentencing phase.

Author's note: Although the Court references *Williams v. Taylor,* 529 U.S. 362 (2000), where the Court examined the mitigating evidence as a whole, this is the first time that the Court expressly stated that the undiscovered mitigating evidence must be analyzed cumulatively ("as a whole"). Counsel should be wary of lower court rulings incorrectly conducting a prejudice analysis by examining the unpresented mitigating evidence claim by claim. Counsel should consider filing a Federal Rules of Civil Procedure, Rule 60(b) motion if the lower court has already analyzed the undiscovered mitigating evidence claim by claim.

"Might well have influenced the jury's appraisal of Rompilla's culpability" is extremely important language. It first appeared in *Wiggins v. Smith*, 539 U.S. 510 (2003), and reappeared in *Rompilla*. This standard is less than a preponderance of the evidence. Counsel should argue that the "reasonable probability" standard required for reversal (or, in other words, confidence in the outcome is undermined) is automatically satisfied anytime the alleged trial or sentencing phase error "might well have influence the jury's appraisal of [the defendant's] culpability."

O'Connor, J., concurring: O'Connor wrote a concurring opinion to put to rest the dissent's concern that the majority opinion "imposes on defense counsel a rigid requirement to review all documents in what it calls the 'case file' of any prior conviction that the prosecution might rely on at trial." Rather than doing this, according to O'Connor, the majority opinion "simply applies [the court's] longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient." Under that case by case approach, O'Connor believes counsel was deficient for three reasons: 1) "Rompilla's attorneys knew that their client's prior conviction would be at the very heart of the prosecution's case" - - one of the aggravating circumstances making Rompilla eligible for the death penalty; 2) the similar nature of the prior conviction threatened to eviscerate counsel's primary mitigation argument - - *i.e.,* residual doubt about Rompilla's guilt made it inappropriate to impose the death penalty; and, 3) counsel's failure to obtain the case file of Rompilla's prior conviction was due to inattention not reasoned trial strategy.

***Bradshaw v. Stumpf*,**
125 S.Ct. 2398 (2005)
(O'Connor, J., for a unanimous court)

The Court held that because, under Ohio law, a person can be convicted of aggravated murder even if the person was not the triggerman, the United States Court of Appeals for the Sixth Circuit erred in granting *habeas* relief on the grounds that 1) Stumpf's guilty plea was not knowing, voluntary, and intelligent, since he pled guilty to aggravated murder, but maintained that he did not shoot the victim; and, 2) due process was violated when the state made the opposite argument on who was the triggerman at the trial of Stumpf's accomplice.

Inconsistent theories at separate trials of co-defendants may violate due process and the Eighth Amendment at sentencing: Because the sentencer's conclusion about Stumpf's principal role in the offense may have been material to its sentencing decision, the Court remanded for further consideration of whether Stumpf's death sentence must be vacated because the prosecution argued that Stumpf was the shooter at Stumpf's trial and that the co-defendant was the shooter at the co-defendant's trial.

Thomas, J., joined by Scalia, J., concurring: Thomas wrote a concurring opinion to note that the Court's opinion does not prevent the state from arguing that 1) the prohibition against granting *habeas* petitioners relief on the basis of new rules of constitutional law established after their convictions become final bars Stumpf from obtaining relief; and, 2) Stumpf procedurally defaulted his due process claim.

Souter, J., joined by Ginsburg, J., concurring: Souter wrote a concurring opinion to point out the remedial issues that arise if a due process violation is found on remand. First, "[m]ay the death sentence stand if the State declines to repudiate its inconsistent position in the codefendant's case?" Second, "[w]ould it be sufficient simply to reexamine the original sentence and if so, which party should have the burden of persuasion?" Finally, "[i]f more would be required, would a *de novo* sentencing hearing suffice?"

***Miller-El v. Dretke*,**
125 S.Ct. 2317 (2005)
(Souter, J., for the Court; Thomas, J., dissenting, joined by Rehnquist, J., and Scalia, J.)

The Court reversed the Fifth Circuit Court of Appeals and granted the writ of *habeas* corpus, holding that the state court's determination of Miller El's *Batson* claim was an unreasonable application of clearly established federal law. At trial, the prosecution used peremptory challenges against 91% of the eligible African-American jurors, resulting in only one out of twenty African-American potential jurors serving on Miller-El's jury. These statistics support a presumption of improperly striking jurors based on race. But, more powerful than these statistics are the "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." The prosecution posed different voir dire questions to potential jurors depending on the juror's race. African-American potential jurors were questioned in detail about their views on the death penalty and whether they were more likely to impose the minimum acceptable sentences. Caucasian jurors did not receive the same questions. The prosecution office's policy to exclude African-Americans from juries, and its shuffling of the venire panel to increase the likelihood that African-Americans would not sit on the jury, also indicate that the prosecution's peremptory challenges were based on race, in violation of the Equal Protection Clause of the United States Constitution. Because the prosecution's proffered reasons for exercising its peremptory challenges against African-American venire members applied equally to Caucasian venire members who were not struck, the prosecution's justifications were pretextual. Thus, the writ of *habeas* corpus must be granted.

U.S. Supreme Court *Certiorari* Grants

***House v. Bell*, No. 04-8990, case below, 386 F.3d 668 (6th Cir. 2004), granted 6/28/05**

1. Did the majority err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts - - merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

***Kansas v. Marsh*, No. 04-1170, case below,102 P.3d 445 (Kans. 2004), granted 5/31/05**

Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

In addition to the question presented by the petition, the parties are directed to brief and argue the following questions:
1) Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. sec. 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?

2) Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

Continued on page 24

Continued from page 23

***Rice v. Collins*, No. 04-52, case below, 348 F.3d 1082 (9th Cir. 2003), granted 6/28/05**

Does 28 U.S.C. sec. 2254 allow a federal *habeas corpus* court to reject the presumption of correctness for state fact finding, and condemn a state court adjudication as an unreasonable determination of the facts, where a rational fact finder could have determined the facts as did the state court?

United States Court of Appeals for the Sixth Circuit

***Harries v. Bell*,**
No. 02-6286 (6th Cir. July 28, 2005)
(Cook, J., joined by, Boggs, C.J., and Gibbons, J.) (affirming grant of habeas relief)

The court affirmed the grant of a conditional writ of *habeas corpus* limited to the sentencing phase, based on trial counsel's failure to investigate readily available mitigating evidence and leads to additional mitigating evidence.

Federal court has inherent authority to hold evidentiary hearing: In this pre-Anti-Terrorism and Effective Death Penalty Act (AEDPA) case, the court overruled *Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997), which held that "because 2254(d) (AEDPA) is an express limitation on the district court's jurisdiction, a district court is without authority to hold an evidentiary hearing on a matter in which the state court has made findings unless one of the factors contained in 2254(d) applies." Citing *Towsend v. Sain*, 372 U.S. 293 (1963), the Court held that the district court did not err in holding an evidentiary hearing, because "a district court does have the inherent authority to order an evidentiary hearing even if the factors requiring an evidentiary hearing are absent."

Author's note: Habeas counsel should request an evidentiary hearing in federal court even if a hearing was held in state court and even if 2254(e)'s (AEDPA's) requirements for obtaining an evidentiary hearing have not been satisfied. *Harries* stands for the principle that determining whether to grant an evidentiary hearing in federal district court is a two-step process. The court must determine if the limitations for holding an evidentiary hearing under 2254(e) have been overcome. If so, a hearing must be held. If not, the federal district court still retains the inherent authority to grant an evidentiary hearing.

Harries was competent to stand trial: A defendant's competence to stand trial is a question of fact that is reviewed *de novo*. A defendant is incompetent to stand trial if the defendant "lacks a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

The court held that expert testimony presented in post conviction was outweighed by trial counsel's assertion at trial that he could communicate with Harries and the pre-trial testimony of two experts that Harries was competent to stand trial, despite suffering from bi-polar disorder.

Trial counsel's failure to investigate mitigating evidence was unreasonable: In determining whether counsel exercised reasonable judgment, a court must determine whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable, in light of prevailing professional norms including the ABA Guidelines. Applying that standard, the court held that counsel failed to conduct a constitutionally adequate investigation.

Counsel limited its investigation to contacting Harries' mother and brother by phone, sending requests for information to some of the institutions in which Harries had been confined, interviewing Harries, interviewing Harries' co-defendant, and interviewing two state witnesses. Counsel declined to seek the assistance of a mental health expert even after Harries' mother alerted counsel to mental health issues. Counsel also failed to investigate Harries' family background, despite indications of a troubled childhood. Despite counsel's belief that Harries' background would not persuade the jury and Harries' instructions that they not pursue mental illness as a defense, the failure to investigate further was unreasonable for two reasons. First, a defendant's "resistance to disclosure of information does not excuse counsel's duty to independently investigate," because the sole source of mitigating factors cannot properly be information which the defendant may volunteer; "counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." Second, not investigating thoroughly because of a belief that it would do no good reflects an abdication of advocacy rather than a strategic decision.

Trial counsel's failure to adequately investigate mitigating evidence prejudiced Harries: In assessing prejudice, courts must reweigh the evidence in aggravation against the totality of available mitigating evidence. Had counsel conducted an adequate investigation, counsel would have discovered evidence of Harries' traumatic childhood, including significant physical abuse Harries suffered. The physical abuse included: 1) being hit in the head with a frying pan; and, 2) being choked so severely that his eyes hemorrhaged. Harries also was exposed to his father and stepfather beating his mother, and his stepfather raping his sister. Both Harries' father and stepfather were murdered. The non-physical abuse included: 1) that since age eleven, Harries spent all but 36 months confined in institutions; 2) that Harries fell out of a moving car when he was three years old; 3) that at age twenty, Harries suffered carbon monoxide poisoning and attempted suicide; 4) that Harries suffered damage to the frontal lobe of the brain, the part of the brain that controls a person's judgment and a person's ability to control impulses;

and, 5) that Harries suffers from a mental disorder, although experts disagree as to what disorder. Because this mitigating evidence "might well have influenced the jury's appraisal of Harries' culpability," confidence in the outcome of the death verdict is undermined. Thus, counsel was ineffective, mandating a new sentencing phase.

The possibility that presenting mitigating evidence could open the door for the prosecution to introduce additional adverse evidence has no effect on determining prejudice from the failure to present mitigating evidence: The court also briefly discussed and disregarded the state's argument that Harries suffered no prejudice because the introduction of the additional mitigating evidence would have opened the door for the prosecution to introduce additional adverse evidence of Harries' criminal background. In disregarding this argument, the court noted that, in *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court found counsel's failure to investigate and present mitigating evidence prejudicial despite the fact that it would have opened the door for the prosecution to introduce additional adverse evidence.

***Madrigal v. Bagley*,**
2005 WL 1503864 (6th Cir. June 27, 2005)
(Gilman, J., joined by Clay, J., and Daughtrey, J.)
(affirming grant of habeas relief)

At Madrigal's trial, the get-away driver refused to testify, having invoked his Fifth Amendment privilege against self-incrimination. Yet, his two statements, comprising 79 pages of the transcript, were introduced to establish that Madrigal was the robber. The Ohio Supreme Court held that the admission of these statements violated Madrigal's Confrontation Clause rights, but held that the error was harmless. The federal district court, despite the limitations on granting relief imposed by the Anti-Terrorism and Effective Death Penalty Act, granted the writ of *habeas corpus*, which in the instant opinion, the Sixth Circuit affirms.

***De novo* review applies to a district court's determination of whether an error was harmless.**

Factors to consider in determining whether a confrontation clause error is harmless: An error is not harmless if there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." In conducting a harmless error analysis of a Confrontation Clause violation, five factors must be considered: "1) the importance of the testimony in the prosecution's case, 2) whether the testimony was cumulative, 3) the presence of evidence corroborating or contradicting the testimony of the witness on material points, 4) the extent of cross-examination otherwise permitted, and 5) the overall strength of the prosecution's case."

Confrontation clause violation requires reversal: The state court decision that the Confrontation Clause violation was harmless was an unreasonable application of clearly established federal law as enunciated by the Supreme Court of the United States for the following reasons: 1) the prosecution did not have any physical or forensic evidence that tied Madrigal to the killing; 2) the eyewitness testimony contained discrepancies about the suspect's description and left open doubt as to the identity of the shooter, making the get-away driver's statement implicating Madrigal an important part of the prosecution's case; 3) the prosecution emphasized the importance of the get-away driver's statements by mentioning them during closing argument (an affidavit of a juror also stating that the get-away driver's statement was important was not a determining factor to the court); 4) in light of the lack of physical evidence, the jury could have believed that the get-away driver's statements reinforced the eyewitness testimony; 5) Madrigal had no opportunity to cross-examine the get-away driver; and, 6) Madrigal's defense theory was that the get-away driver himself committed the murder.

***Tyler v. Bell*,**
2005 WL 1706952 (6th Cir. July 20, 2005)
(Gibbons, J., joined by Rogers, J., and Sutton, J.)
(affirming death sentence)

State's interest in reliable sentencing does not require introduction of mitigating evidence over a defendant's objection: The court held that the Ohio Supreme Court's ruling that the state's interest in a reliable sentencing determination did not require counsel to introduce mitigating evidence over the defendant's objection was neither contrary to or an unreasonable application of clearly established federal law. Relying on *Coleman v. Mitchell*, 244 F.3d 533 (6th Cir. 2001), which held that counsel is not ineffective when a competent defendant prevents the investigation and presentation of mitigating evidence, the court ruled that the Constitution does not prohibit a competent capital defendant from waiving the presentation of mitigating evidence, despite the valid state interest in a reliable sentencing determination. "That interest is protected by giving the defendant an opportunity to introduce the mitigating evidence available to him, and requiring the sentencer to consider it. But where he chooses to forgo the opportunity, no societal interest counterbalances his right to control his own defense."

Author's note: Arguably, *Coleman v. Mitchell* is not good law in light of *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 2005 WL 1421390 (U.S. June 20, 2005).

Claims raised for first time in traverse are procedurally defaulted: Tyler argued that the evidence was insufficient to support a conviction. In his traverse, he also argued penalty-phase insufficiency of the evidence. The court held that "[b]ecause the penalty-phase insufficiency argument

Continued on page 26

Continued from page 25

was first presented in Tyler's traverse rather than in his habeas petition, it was not properly before the district court . . . or this court."

Evidence was sufficient to support a death sentence: "[T]he standard of review for insufficient evidence claims is whether, after viewing the facts in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Despite the claim being procedurally defaulted, the court also denied the claim because Tyler's "insufficient evidence argument rests on an allegation involving witness credibility, which is clearly the province of the jury."

In re Lott,
2005 WL 151367 (6th Cir. June 22, 2005) (unpublished)[2]
(Merritt, J., Cole, J., for the court; Boggs, C.J., dissenting)

Lott previously was granted permission to file a successor *habeas* petition alleging that the prosecution withheld material and exculpatory evidence that would establish that, but for the prosecution's conduct, no reasonable fact finder would have found him guilty of the murder. The federal district court construed this claim as a claim of actual innocence of the underlying crime, determined that Lott injected his factual guilt or innocence of murder into the proceeding, and ruled that through this assertion of innocence, Lott "implicitly waived the attorney-client and work product privileges to the extent necessary for the [state] to defend the actual innocence." Thus, the district court authorized the deposition and production of documents from Lott's trial counsel concerning "any statement Lott made to his counsel regarding his innocence or guilt and any statement made to counsel concerning whether he confessed the murder to the police." Lott sought *mandamus* relief. The Sixth Circuit granted an immediate stay of discovery pending further consideration by the court.

Scope of discovery and admissibility is not a proper issue for interlocutory appeal.

Factors to consider in determining whether to grant a stay: In determining whether to grant a stay, this Court considers 1) the likelihood that the party seeking the stay will prevail on the merits, 2) the likelihood that the moving party will be irreparably harmed absent a stay, 3) the prospect that others will be harmed if the court grants the stay, and 4) the public interest in granting the stay.

Factors favor granting a stay pending further review: Although the state has an interest in the efficient use of judicial resources and in achieving final resolution of criminal cases, the harm that would be caused to the state by a stay does not outweigh the important interests of *Lott*, the legal system, and the public interest in resolving the question presented by this case.

In determining whether the attorney-client privilege has been waived, courts "must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." In the *habeas* context, waiver is usually found when a petitioner asserts his or her counsel's ineffectiveness. No court has found an implied waiver of the attorney-client privilege based on an assertion that the police invented the petitioner's confession and an assertion of actual innocence. Because the district court's order "appears to be an unsupported departure from the law of implied waiver, it is likely that relief will be granted." Thus, a stay should be granted, particularly since "forced disclosure of privileged material may bring about irreparable harm."

Boggs, C.J., dissenting: Judge Boggs believes the court applied the incorrect standard. Instead of applying the standard for an injunction, he believes the court should have applied the five-part test applicable to determining whether to grant a writ of *mandamus*. Applying this test, he concluded that *mandamus* should not be granted because any prejudice suffered from the discovery orders of the district court could be remedied on appeal.

Endnotes

1. *But cf., Abdur'Rahman, supra*, discussing, *Gonzalez*'s holding that a change in law is rarely an extraordinary circumstance falling within the ambit of Federal Rules of Civil Procedure, Rule 60(b).

2. Sixth Circuit Rule 28(g) permits counsel to cite to an unpublished Sixth Circuit opinion before the Sixth Circuit or the federal district courts within the circuit when a party believes that an "unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well." ■

Kentucky Law Blog

A relatively new blog edited by Michael Stevens is an excellent resource for Kentucky Lawyers trying to stay up on current events. This blog is designed to be "an on-line journal about Kentucky law - appellate decisions of the Kentucky Supreme Court and Court of Appeals, changes in the statutes, and anything else of interest to Kentucky lawyers."
http://www.kentuckylawblog.com/

6TH CIRCUIT CASE REVIEW

by David Harris, Post Conviction Branch

David Harris

Jackson v. Jamrog,
411 F.3d 615 (6th Cir. 2005)

Michigan inmate files federal *habeas corpus* petition, challenging the constitutionality of a statute permitting prosecutors and crime victims to appeal the granting of parole, without providing a means for inmates to appeal the denial of parole. Inmate claims that this statute violates equal protection.

Both the district court and the 6th Circuit began reviewing this case under a presumption that the parties involved are "similarly situated." Next, finding that inmates are not a "suspect class" for equal protection purposes, *Wilson v. Yaklich*, 148 F.3d 596 (6th Cir. 1998), that there is no fundamental right to parole, *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987), and that the right of access to the courts is not absolute but pertains to an inmate's right to challenge his conviction or sentence, *Lewis v. Casey*, 518 U.S. 343 (1996), of which parole is neither, the 6th Circuit determined that a rational-basis analysis was the proper standard for reviewing the constitutionality of the Michigan statute. As justification for the statute, the state argued that this law sought to decrease frivolous inmate appeals and alleviate the growing financial burden on state courts. The district court found deterrence of frivolous inmate lawsuits to be a "legitimate legislative goal," citing *Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997). The 6th Circuit agreed with this finding, noting that Michigan prisoners still have a means to seek relief for the denial of parole based on race, religion, or some other illegal basis. Thus, the district court's denial of *habeas* relief was affirmed.

United States v. Dixon,
___ F.3d ___ (6th Cir. 2005), 2005 WL 1503863

Defendant was charged with attempted bank extortion, and the case was to be tried in federal district court. After a pretrial evidentiary hearing, the district judge ruled that the testimony of three gprosecution witnesses would be excluded. The government appealed this ruling to the 6th Circuit, which reviewed the district court's ruling for an abuse of discretion.

Two of the government's witnesses, (the defendant's son, Dixon, Jr., and one of his ex-wives, Kathy Alexander), were to testify that the man depicted in the bank's surveillance video was, in fact, the defendant. Federal Rule of Evidence (FRE) 701(b) permits lay witnesses to offer opinion testimony when such testimony would be "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Citing *United States v. Pierce*, 136 F.3d 770 (11th Cir. 1998), the 6th Circuit pointed out several factors relevant to the analysis of whether a lay witness is more likely than a jury to correctly identify the defendant from a photo or video: (1) the witness's general familiarity with the defendant's appearance, (2) the witness's specific familiarity with the defendant's appearance (a) at the time or (b) when dressed in a similar manner, (3) whether the defendant disguised his appearance, and (4) whether the defendant has changed his appearance prior to trial. Other factors are the clarity of the image and the "quality and completeness" with which the defendant is shown in the picture, *e.g.* if the entire body is shown, or just the left profile of the face is shown, etc. Reviewing these factors as considered by the district court, the 6th Circuit concluded that the testimony of these two witnesses, Dixon, Jr., and Alexander, only really met criteria number (1) for helpfulness, and therefore the district court's exclusion of their lay opinion/identification testimony was not an abuse of discretion.

The government's third witness, (another ex-wife, named Penny Weems), was to be called for two purposes. First, she also was to offer lay testimony identifying the man in the surveillance photos as the defendant. Her testimony similarly failed to meet the criteria stated above. Additionally, and as the grounds by which the district court excluded her testimony, was the fact that she had several reasons for bias against the defendant. Specifically, Weems testified that: she accused the defendant of physical and mental abuse against her during their marriage, she believed defendant was a bad influence on their daughter, and she was angry with defendant for failing to pay child support (for which she filed a petition against him, asking him to be held in contempt of court for failing to pay $14,000 and asking him to be jailed for six months). The district court, citing *United States v. Calhoun*, 544 F.2d 291 (6th Cir. 1976), excluded the testimony because the pre-existing relationship between Weems and the defendant would make it very difficult to effectively cross examine Weems on her potential bias without revealing highly prejudicial information about the defendant. The 6th Circuit again found no abuse of discretion.

The government also sought to call Weems to testify about a conversation she had had with her father, approximately 15 months after the crime occurred. Weems's father allegedly

Continued on page 28

Continued from page 27

told her that the defendant had made incriminating statements to him: (1) asking if he could get away with something if he changed his appearance, and (2) mentioning extortion at the bank and $250,000. Subsequently, Weems mentioned this conversation to the defendant, at which she claims that the defendant "lost the color in his face." The government admitted that it would not call Weems's father, stating that "he's done 180 degrees, for whatever reason, and does not recall those things." To avoid hearsay, the government also claimed that it sought to introduce Weems's testimony, not for the truth of the matter asserted, but to show the defendant's reaction. The district court, applying FRE 403's probative value v. unfair prejudice analysis, excluded this testimony. The 6th Circuit found no abuse of discretion, and affirmed the evidentiary rulings of the district court.

Burroughs v. Makowski,
411 F.3d 665 (6th Cir. 2005)

Petitioner was convicted by jury of 2nd Degree Murder, Felony Murder, Armed Robbery, and felony firearm charges. Prior to sentencing, petitioner pled guilty to being a habitual felon. The trial court granted Judgment N.O.V. on both murder convictions, based on insufficient evidence. The Michigan Court of Appeals reversed the J.N.O.V. rulings, and affirmed the other convictions. Considering the double-jeopardy issue, the appellate court then vacated the second-degree murder, armed robbery and habitual offender-second convictions and remanded for sentencing on the felony murder and felony firearm charges.

In 1992, prior to resentencing, petitioner filed a state post conviction action on the remaining charges, asking for a new trial based on prosecutorial misconduct, ineffective assistance of counsel (IAC) and ineffective assistance of appellate counsel (IAAC). The circuit court rejected this motion and sentenced petitioner. Petitioner appealed, claiming a violation of the Eighth Amendment, which the appellate court rejected.

In 1997, petitioner filed a second state post conviction motion. The circuit court denied this motion both on the merits as well as on the first post conviction's motion's decision. The state appellate courts denied petitioner leave to appeal, holding that he failed to establish entitlement under the rule, apparently ruling that he was procedurally defaulted.

In 1998, petitioner filed a petition for *habeas corpus* in the federal court, alleging the same issues presented in his 1997 state post conviction action. The magistrate judge determined that his claims were not procedurally barred, finding that the state circuit court decided the 1997 post conviction motion on the merits. Further, the magistrate recommended granting the *habeas*, finding merit in petitioner's claims. The district court adopted the magistrate's recommendation.

In *Burroughs v. Makowski*, 282 F.3d 410 (6th Cir. 2002), the 6th Circuit reversed the district court's decision, finding petitioner's claims to be procedurally defaulted and thus ineligible for federal *habeas corpus* review. The 6th Circuit found the state appellate court's denial of petitioner's 1997 post conviction action to be based on state procedural grounds, and therefore, procedurally defaulted.

On remand, petitioner argued that IAAC was his "cause" for procedural default, and that his procedural default should be excused. The magistrate judge agreed, recommended re-granting the writ, and the district court adopted the recommendation.

Finally in the instant case, the 6th Circuit pointed out that "cause for the procedural default and prejudice attributable thereto" must be shown to excuse procedural default. *Murray v. Carrier*, 477 U.S. 478 (1986). The cause must be an objective external factor which impeded petitioner's efforts to comply with the state procedural rule. *Edwards v. Carpenter*, 529 U.S. 446 (2000). The magistrate judge found petitioner's 1997 post conviction action to be his first, interpreting the 1992 motion as merely a motion for a new trial, not a motion for relief from judgment. The 6th Circuit disagreed, pointing out that the subsequent state appellate courts denied the 1997 motion on the basis that the claims were procedurally defaulted. Thus, the 6th Circuit determined that the IAAC claim was procedurally defaulted, and therefore not a claim that could amount to cause and prejudice. The district court's order was reversed and remanded with instructions to dismiss the writ.

Maldonado v. Wilson,
___ F.3d ___ (6th Cir. 2005); 2005 WL 1654766

Petitioner was convicted of murder, tampering with physical evidence, and abuse of a corpse. Prior to trial, co-defendant "Price" entered into a plea agreement in which he agreed to testify against petitioner and plead guilty to tampering with evidence in exchange for keeping his case and sentencing in juvenile court. However, as he had given several inconsistent statements, Price was also required to take and pass a computer voice stress analysis ("CVSA") test as part of the agreement.

On direct examination, Price testified that he went to petitioner's house where he witnessed petitioner strangle the victim with shoelaces, put the body in a garbage can, and drag the can outside. Once outside, Price helped petitioner drag the garbage can to the edge of some woods. Price saw petitioner rub alcohol on the victim's body, but ran home before petitioner burnt the body. On cross- examination, petitioner's attorney questioned Price about his various stories to the police, demonstrating that he had lied. At one point in the questioning, without solicitation, Price began to explain that he had taken a lie-detector test, stating "I took a lie…" to which counsel objected. The trial court sustained the objection and the statement was stricken.

Later, during cross-examination of the detective, defense counsel "strongly challenged the quality of Price's testimony, and suggested that the police prematurely identified [petitioner] as the primary suspect, notwithstanding Price's prior contradictory statements to police." On redirect, the prosecutor informed the judge at the bench that, in order to restore the detective's credibility to the jury, he was going to ask the detective if he believed Price's last story and why. Defense counsel's objections were overruled. The detective testified that he believed Price's last story "because he was tested." Defense counsel objected again; the trial court refused to strike the statement.

The Ohio Court of Appeals reviewed this issue under state law, and found that the trial court's admission of this testimony and/or failure to strike the testimony about the lie-detector test was error. However, the appellate court also determined that, when taken with everything as a whole, this error was not prejudicial.

Petitioner then sought a writ of *habeas corpus*. The federal district court determined that the state court's ruling did not deprive petitioner of a "fair" trial. Noting that the Ohio appellate court found the error to be harmless, the federal district court ruled that the Ohio Court of Appeals "reasonably" applied federal law.

The 6th Circuit began its analysis noting that it must review this case under a modified form of AEDPA deference per *Howard v. Bouchard*, 405 F.3d 459 (6th Cir. 2005). Because the state court did not discuss its decision on the constitutional issue involved, the reviewing federal court must conduct an independent review of the record and applicable law. However, under this deferential standard, the federal court may not reverse the state court unless the state court's decision is contrary to or an unreasonable application of federal law.

Using this standard, the 6th Circuit held that the Ohio Court of Appeals' decision was not an unreasonable application of federal law, as no "established" United States Supreme Court precedent has held that statements concerning lie-detector tests renders a trial fundamentally unfair. The 6th Circuit affirmed the decision of the district court denying the petition.

*Note: Petitioner's prosecutorial misconduct claim was held forfeited, as this particular issue was only loosely and indirectly "attached" to his argument against the lie-detector testimony, and not developed independently.

Jones v. Jamrog,
___ F.3d ___ (6th Cir. 2005); 2005 WL 1579729

Petitioner was convicted of felonious assault. Prior to trial, petitioner complained that he could not assist counsel in the preparation of his defense because he could not spend enough time with his attorney to adequately review discovery. Pursuant to a local rule, the prosecution would furnish the defense attorney with a copy of the discovery on the condition that it remained in the lawyers' custody at all times. Faced with this dilemma, petitioner informed the trial court that he wished to represent himself.

The trial court, after questioning petitioner at length, denied petitioner's request to represent himself. The court determined that his request was not unequivocal because petitioner stated that he would rather not represent himself, but as long as the local rule regarding discovery was upheld, that was what he wanted to do. Further, petitioner did not state any specific differences of strategy, etc. between himself and his appointed attorney. The Michigan Court of Appeals affirmed, and the Michigan Supreme Court declined review.

Petitioner filed for a writ of *habeas corpus*, alleging that his Sixth Amendment rights were violated when he was denied self-representation at trial. The district court denied his petition, similarly finding his request for self-representation to be equivocal.

The 6th Circuit notes that the applicable clearly-established United States Supreme Court precedent on this issue is *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, the Supreme Court held that the right to self-representation is a fundamental and affirmative right under the Sixth Amendment. As this right necessarily involves a waiver of the corollary right to counsel, a request for self-representation must be made knowingly, intelligently, and voluntarily.

The *Faretta* defendant wanted to represent himself because he believed the local public defenders were overworked and would not have enough time to adequately work on his case. Though he told the court he would prefer the appointment of private counsel with more time, which the court denied, he decided he preferred to represent himself than to go to trial with an attorney who he felt would not be prepared. Similarly, petitioner in the instant case preferred to be represented by counsel, but, given the choice between counsel and having enough time to review his discovery (as the court would not forego the local rule), petitioner determined that he would rather have the discovery and represent himself. Though the state and district courts viewed petitioner's reasoning as "equivocating," the 6th Circuit saw petitioner's reasoning as his own strategic choice made in the face of an obstacle. Further, as no questions were raised about petitioner's competency or sincerity, the 6th Circuit reversed the district court's decision, instead finding that the ruling of the state courts constituted an unreasonable application of United States Supreme Court precedent, as found in *Faretta v. California*. The 6th Circuit granted petitioner a conditional writ of *habeas corpus*, ordering petitioner to be released from custody unless retried within 180 days. ■

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Henson v. Commonwealth
2005 WL 1703626, 2005 Ky. App. LEXIS 161
(Ky. Ct. App 2005)

On February 27, 2003, Officer Larry Turner of the Jackson Police Department got a tip that Greg Haddix was driving a black Pontiac Grand Am and that his passenger, Jacob Henson, was in possession of drugs. Turner, who knew both Haddix and Henson, found them and pulled them over. He told Henson to empty his pockets, and Henson pulled out a bag with cocaine in it as well as hypodermic needles. Henson was charged with possession of a controlled substance in the first degree. His motion to suppress was overruled, and he entered a conditional guilty plea.

In an opinion by Judge Minton and joined by Judges Emberton and Schroder, the Court of Appeals affirmed the decision of the trial court. Relying upon *Stewart v. Commonwealth*, 44 S.W. 3d 376 (Ky. App.2000), the Court held that there was a reasonable suspicion at the time Henson was confronted and thus the Fourth Amendment was not violated. The Court found that the officer had corroborated the anonymous tip sufficiently. "The details provided by the informant were very specific and contained predictive information that few would be aware of—namely, that Henson had drugs in his possession. A sufficient indicia of reliability existed in that the officers were able to corroborate a significant amount of the tipster's information, locate Henson, and seize the drugs in his possession…Under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to satisfy the reasonable suspicion standard and justify the investigatory stop. In addition to the sufficiency of corroboration by Officer Turner, Henson's consent to the search by Officer Turner supports the circuit court's decision to deny the motion to suppress."

Judge Schroder dissented. He did not believe that the facts constituted a reasonable suspicion. "The significant facts supplied by the anonymous caller (other than Henson had drugs) is perfectly legal activity. I would have dispatched a cruiser also but only for observation. When no suspicious activity was observed, the search was not based on a reasonable suspicion but on an anonymous tip which itself carries no 'indicia of reliability.'" Judge Schroder also disagreed that Henson had consented to turning over the items of contraband. "When instructed to empty his pockets, Henson complied, as he should have. If he refused, the officer would have forced the issue. I think the better procedure was taken by Henson, comply and argue to suppress. This was not a voluntary consent to search."

Poe v. Commonwealth
2005 WL 1703261 2005
Ky. App. LEXIS 161
(Ky. Ct. App. 2005)

A Hopkinsville Police Officer stopped Kevin Poe at 1:30 a.m. as a "courtesy stop…to possibly offer directions." When stopping Poe, the officer turned on his emergency lights. The officer noted that Poe had "bloodshot eyes, a carefree attitude, and was not wearing a seatbelt." Poe admitted during questioning to smoking marijuana. He was charged with DUI, no insurance, possession of marijuana, and possession of drug paraphernalia. His motion to suppress was overruled. At the evidentiary hearing the officer admitted that he had seen no criminal activity at the time of the stopping. He also admitted that the stopping took place in a "very high drug activity area…Each time I passed him by Mr. Poe had pretty much been smiling and then I got him stopped." Poe entered a conditional plea of guilty, and appealed to circuit court, where the district judge was affirmed. The Court of Appeals granted discretionary review.

In an opinion by Judge Barber and joined by Judges Schroder and Huddleston, the Court of Appeals reversed. The Court rejected the Commonwealth's position that the stopping was justified under *Cady v. Dombrowski*, 413 U.S. 433 (1973), which established the community caretaking exception. "The question is was Officer Marszalek's stop of Poe reasonable in the circumstances. We hold it was not. The public need in this case is slight. People commonly become lost, if in fact Officer Marszalek's assumption about Poe's driving was correct. Police officers do not normally pull someone over because they believe the operator of the vehicle needs directions. The intrusion on the privacy of the citizen, however, is great. The ordinary citizen would not expect a police officer to activate his emergency lights and effect a stop with which the citizen must comply without the stop being supported by some sort of traffic violation or criminal activity….[F]or the community caretaking function to apply there must be some specific and articulable facts that would lead the officer to reasonably believe the citizen is need of assistance."

This is a case where the use of the objective standard inured to the benefit of the defendant. "Such an objective assessment must also be applied in the context of an argument for the community caretaking function, otherwise, the protections afforded by the Fourth Amendment would quickly be eroded. Court approval of any reason related to 'public

need' for stopping and detaining a citizen based on the subjective beliefs of police officers is constitutionally insufficient." Using this standard, the Court held that the stop in this case violated the Fourth Amendment. "Officer Marszalek observed no traffic violations, no criminal activity, and no evidence such as a flat tire, flashing lights, jumper cables, a raised hood or any other indication that Poe required assistance. The community caretaking function does not provide justification for the stop in this case."

Muehler, et al. v. Mena
125 S.Ct. 1465, 161 L.Ed.2d 299(2005)

Two police officers learned that a member of the West Side Locos lived at 1363 Patricia Avenue and that because he had been involved in a drive-by shooting the officers also believed he was armed. Officers Muehler and Brill obtained a search warrant. The warrant was served while the house was "secured" by a SWAT team. Mena was in bed when the SWAT team came in. They handcuffed her with guns drawn. Mena along with three others who were similarly handcuffed were taken to a garage. An INS officer accompanied the officers during the search and questioned Mena and the others regarding their immigration status. As a result of the search, a handgun, ammunition, a bag of marijuana, and gang related paraphernalia was seized. Thereafter, Mena filed a civil suit under 42 USC #1983 alleging a violation of her Fourth Amendment rights as a result of the manner in which she had been detained and the manner in which the warrant was executed. The trial court denied the officers' motion for summary judgement, and the 9th Circuit affirmed. Thereafter, a jury found that the officers had violated Mena's Fourth Amendment rights, and aware her $60,000. The Court of Appeals affirmed. 332 F. 3d 1255 (9th Cir. 2003). The Circuit Court held that the officers had violated Mena's Fourth Amendment rights when they confined her in the garage in handcuffs. Further, they held that questioning her about her immigration status while in the garage also violated her Fourth Amendment rights, and because those rights were clearly established, the officers were not entitled to qualified immunity.

In an opinion written by Justice Rehnquist, the US Supreme Court vacated the judgement of the 9th Circuit. The Court held first that Mena's detention was legal under the authority of *Michigan v. Summers*, 452 U.S. 692 (1981). "An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'…Thus, Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search."

The Court also held that the use of force to detain Mena did not violate the Fourth Amendment. "Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention…The officers' use of force in the form of handcuffs to effectuate Mena's detention in the garage, as well as the detention of the three other occupants, was reasonable because the governmental interests outweigh the marginal intrusion."

The Court rejected Mena's argument that the duration of the handcuffs was an independent Fourth Amendment violation. The "2-3 hour detention in handcuffs in this case does not outweigh the government's continuing safety interests. As we have noted, this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. We conclude that the detention of Mena in handcuffs during the search was reasonable."

The Court also overturned the Ninth Circuit's finding that the questioning of Mena regarding her immigration status was an independent violation. "We have 'held repeatedly that mere police questioning does not constitute a seizure.'…[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual."

Justice Kennedy concurred in the judgement, writing separately in order to emphasize that police handcuffing should become "neither routine nor unduly prolonged." He wrote a virtual handbook on when handcuffing is appropriate and when it is not, perhaps mindful of the prisoner abuses at Abu Graib and elsewhere. "If the search extends to the point when the handcuffs can cause real pain or serious discomfort, provision must be made to alter the conditions of detention at least long enough to attend to the needs to the detainee…" However, under all of the circumstances, Justice Kennedy believed that the handcuffing and its duration did not violate the Fourth Amendment.

Justice Stevens also wrote a concurring opinion, joined by Justices Souter, Ginsburg, and Breyer. While these four concurred, they disputed the use of *Michigan v. Summers*, 452 U.S. 692 (1981) in the Court's opinion. "Given the facts of this case…I think it clear that the jury could properly have found that this 5-foot-2-inch young lady posed no threat to the officers at the scene, and that they used excessive force in keeping her in handcuffs for up to three hours. Although *Summers* authorizes the detention of any individual who is present when a valid search warrant is being executed, that case does not give officers *carte blanche* to keep individuals who pose no threat in handcuffs throughout a search, no matter how long it may last. On remand, I would therefore instruct the Court of Appeals to consider whether the evidence supports Mena's contention that the petitioners used excessive force in detaining her when it considers the length of the *Summers* detention."

Continued on page 32

Continued from page 31

The concurrence also found that the use of the SWAT team was reasonable. "When officers undertake a dangerous assignment to execute a warrant to search property that is presumably occupied by violence-prone gang members, it may well be appropriate to use both overwhelming force and surprise in order to secure the premises as promptly as possible."

Finally, the concurrence found that the jury could have found the use of the handcuffs to have been unreasonable. "In short, under the factors listed in *Graham* and those validly presented to the jury in the jury instructions, a jury could have reasonable found from the evidence that there was no apparent need to handcuff Iris for the entire duration of the search and that she was detained for an unreasonably prolonged period. She posed no threat whatsoever to the officers at the scene. She was not suspected of any crime and was not a person targeted by the search warrant. She had no reason to flee the scene and gave no indication that she desired to do so. Viewing the facts in the light most favorable to the jury's verdict…there is certainly no obvious factual basis for rejecting the jury's verdict that the officers acted unreasonably, and no obvious basis for rejecting the conclusion that, on these facts, the quantum of force used was unreasonable as a matter of law."

United States v. Laughton
409 F. 3d 744 (6th Cir. 2005)

Thomas Pell was an informant. He let the Isabella County Sheriff's Department know that he had bought meth from James Laughton. A Deputy Sheriff gave Pell $100 to purchase additional meth from him. They watched him go into Laughton's house, and they recovered meth from him thereafter. A week later they repeated the procedure. Thereafter, Det. Scott Clarke applied for a warrant to search Laughton's house. In the warrant application, Clarke stated that "your Affiant has worked with a Confidential Informant (CI), who has made multiple purchases of Methamphetamine in the last 48 hours. Affiant has observed this controlled purchase. Through the course of this investigation your Affiant has learned that James Howard Laughton will keep controlled substances/drugs in the crotch area of his pants and in his pants pockets. Further that there are various stashes around the home. This CI is believed to be credible and reliable…." A county prosecutor was shown the petition, and signed off on it. A magistrate issued a search warrant of Laughton's house which resulted in a seizure of methamphetamine, marijuana, and firearms. Laughton was charged with a variety of federal crimes. The district judge overruled Laughton's motion to suppress based upon the good faith exception to the warrant requirement. Laughton appealed to the Sixth Circuit.

Judge Daughtrey wrote an opinion reversing the district judge. He was joined by Judge Rice. Based upon the above presentation of the facts, the panel agreed that the affidavit "failed to indicate any connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there." However, the panel overruled the district judge's decision that the search did not violate the Fourth Amendment because of the good faith exception. The Court held that no "reasonable officer could have believed that the affidavit was not so lacking in indicia of probable cause as to be reliable." In so doing, the Court noted that the "investigating officer's affidavit did not indicate where the confidential informant had made 'multiple purchases of methamphetamine.' It did not even say explicitly that the confidential informant had purchased the narcotics from the suspect. Finally, the statement that the confidential informant had observed 'controlled substances at or in the residence or located on the person of James Howard Laughton' does not indicate where that residence was or when these observations were made, raising the possibility that the information was stale."

The Court rejected the government's assertion that the Court should look at what the officer knew at the time he prepared the affidavit. "We further conclude that a determination of good-faith reliance, like a determination of probable cause, must be bound by the four corners of the affidavit. Whether an objectively reasonable officer would have recognized that an affidavit was so lacking in indicia of probable cause as to preclude good faith reliance on the warrant's issuance can be measured only by what is in that affidavit."

Judge Gilman wrote a dissenting opinion. While he agreed with the majority that the affidavit failed to demonstrate the existence of probable cause, he found sufficient nexus between the crime and the place to be searched as to justify the use of the good faith exception. "The *Leon* good-faith exception seems to me fully applicable to the case before us. Despite its deficiencies as summarized above, the affidavit's statement of facts was well beyond 'bare bones.' The officer, moreover, brought the affidavit to the county prosecutor his approval prior to presenting it to the magistrate."

United States v. Moncivais
401 F. 3d 751 (6th Cir. 2005)

Alberto Moncivais flew from San Antonio to Memphis, Tennessee, and checked into Room 669 of a local Holiday Inn. Immediately prior to his arrival, undercover officers arrested two brothers for trafficking in cocaine. Anthony Davis agreed to cooperate with the investigation of their drug supplier. Davis called one of his suppliers, who then made a three way call to Moncivais. The police recorded that conversation. Moncivais was arrested the day after the conversation as he was preparing to get on a plane to return to San Antonio. Moncivais was indicted on several counts of con-

spiracy to distribute cocaine. He entered a conditional plea of guilty after his motions to suppress were denied.

The Sixth Circuit affirmed the district court in an opinion written by Judge Beckwith joined by Judges Norris and Cook. The Court held that the recording of the conversation between Moncivais, Laurel, and Anthony Davis did not violate Moncivais' Fourth Amendment rights. "The presence of a third person was known to Moncivais and he thus is deemed to have consented to the possibility that the third person record the conversation. The district court relied on *Rathbun v. United States*, 355 U.S. 107, 111, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957), where the Supreme Court held: 'Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain.'" The Court also rejected the highly fact-bound assertions that Moncivais' arrest was conducted without probable cause and that an affidavit was recklessly false.

United States v. McCraven
401 F. 3d 693 (6th Cir. 2005)

In October of 2001, the Memphis Police Department applied for a search warrant to search McCraven's house, saying that they had "talked with a reliable informant of Memphis, Shelby County, Tennessee who has given the affiant other information in the past, which has found [sic] to be true and correct. This reliable informant stated that within the past five days of October 12, 2001, this reliable informant has been inside of [Mr. McCraven's house] and observed the m/b Jackie McCraven storing and selling cocaine and marijuana inside the residence. This occurred in Memphis, Shelby County, Tennessee."

The warrant was executed by the officers knocking and announcing, waiting for 10-12 seconds, and then entering McCraven's house. Powder cocaine, crack cocaine, marijuana, and a handgun were seized. McCraven was indicted on drug and firearms charges. He moved to suppress, which was denied. McCraven entered a conditional plea of guilty and appealed to the Sixth Circuit.

In an opinion by Judge Nelson and joined by Judges Cole and Sargus, the Sixth Circuit affirmed. The Court first determined whether the judge had a substantial basis for finding probable cause sufficient to issue the affidavit. The Court first noted that the facts in the affidavit "from which the issuing judge could independently determine the informant to be reliable" were fewer than had been approved in the past. "There are no averments about the length of the relationship between the detectives and the informant, there are no averments about the nature of the information provided by the informant in the past, and there is no suggestion that the detectives named the informant to the issuing judge." Yet, the Court went on to state that "independent corroboration of an informant's story is not necessary to a determination of probable cause." The Court decided that the "sufficiency of the present affidavit is a close question" that did not have to be resolved. Instead, the Court found that the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984) should apply. "[I]t seems obvious that the law-enforcement version of the hypothetical 'reasonable person'—*i.e.* 'a reasonably well trained officer'—would not necessarily have known that the affidavit supporting the warrant at issue here was insufficient, if in fact it was insufficient."

The Court also held that the knock and announce rule had not been violated. The Court found that 10-12 seconds was reasonable under the circumstances. The fact that the execution of the warrant took place during the day as well as the fact that the distribution of cocaine was involved was of particular significance to the Court. "A reasonable officer could believe, it seems to us, that a longer time might have allowed McCraven to dispose of the drugs in his possession."

United States v. Marxen
410 F. 3d 326 (6th Cir. 2005)

Two persons robbed a Dairy Mart on August 3, 2002 in Louisville, Kentucky. A witness gave a description including a license number and a vehicle type. While there was some confusion whether the car was an Altima rather than a Toyota, an officer later stated that the car was consistently described as an Altima. Marxen owned an Altima with the license number that had been reported. He was placed under surveillance for a few days, but did nothing suspicious. Eleven days after the robbery, Marxen was pulled over. He was charged with a drug offense, and eventually confessed to the Dairy Mart robbery. He was charged in federal court with several offenses. His motions to suppress the statements were granted. The government appealed.

In a decision by Judge Reeves and joined by Judges Siler and Rogers, the Sixth Circuit reversed the decision suppressing the evidence. The district judge had found that there was no probable cause due to the fact that Marxen's description did not match that of the victim's description, and due to the fact that eleven days had passed since the robbery. The Court posed the question thusly: "whether the police are permitted to make *Terry* stops to investigate completed crimes when the police have reasonable suspicion to believe only that the stop will produce evidence of a crime and do not have reasonable suspicion to believe that the person so stopped has committed a crime." The Court held in the affirmative. "Although Marxen himself was not believed to be one of the robbers, the stop of his car could clearly lead to evidence that would permit the police to locate the robbers, and therefore protect the public from the

Continued on page 34

Continued from page 33

threat the robbers posed. The law enforcement interests at stake were therefore still significant, and outweigh the individual's interest to be free of a stop…In summary, we conclude that police are permitted to conduct a *Terry* stop to investigate completed felonies if they have reasonable suspicion to believe that the vehicle stopped was involved in criminal activity and the stop may produce evidence of a crime even if officers do not have reasonable suspicion to believe that the owner and/or driver of the vehicle was directly involved in the criminal activity."

United States v. Plavcak
411 F.3d 655 (6th Cir. 2005)

This is a case in which the Sixth Circuit fleshes out the meaning of exigent circumstances. The United States Government was investigating allegations of immigration fraud in several cities, including Lexington, Kentucky. As part of that investigation, warrants were obtained and executed by INS agents. During the warrant execution, Norbert Plavcak and Jana Gloncakova contacted a person who had hired them but who was also a confidential informant for the INS. Plavcak then called the owner of the company alleged to have been engaged in immigration fraud. After that conversation, Plavcak told the confidential informant and Gloncakova to destroy documents before the INS could reach them. Plavcak and Gloncakova took the documents and a computer to an apartment where they began to burn them in the fireplace. The INS arrived and Gloncakova and Plavcak fled with the computer. They were later arrested and charged with a series of federal crimes related to the destruction of property to prevent a seizure. A motion to suppress was filed and the district judge sustained the motion. The Government appealed.

The Sixth Circuit reversed that part of the opinion related to the Fourth Amendment in an opinion written by Judge Rosen and joined by Judges Sutton and Cook. Initially, the Court agreed with the district judge that in order to be guilty of destroying property to prevent seizure that there had to be a warrant authorizing the seizure of that property. However, the Court reversed the district judge's decision that there were no exigent circumstances justifying the seizure. The Court noted that there were four general categories typically used to justify the use of the exigent circumstances exception: "(1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, and (4) a risk of danger to the police or others." The Court went on to flesh out other times in which the exigent circumstances exception has typically been used. The exception is used when there is the need for prompt action that if delayed to obtain a warrant would be unacceptable. Second, "the Supreme Court has directed that we balance the interests by weighing the governmental interest being served by the intrusion against the individual interest that would be protected if a warrant were required." Finally, "the Supreme Court has suggested that exigent circumstances will more likely be found where the defendant's conduct has somehow diminished the reasonable expectation of privacy he would normally enjoy and which would normally be protected by the issuance of a warrant."

The Court found the existence of exigent circumstances under the factors outlined above. "After apprehending Plavcak and Gloncakova, the agents returned to the Russians' apartment with the two fugitives and seized the computer and undestroyed documentary evidence. The foregoing amply demonstrates that any delay would have resulted in the complete destruction of all of the evidence…We next find that the warrantless seizure of the evidence clearly furthered a compelling governmental interest. The evidence seized was materially important to a wide-ranging, ongoing investigation of alien smuggling, visa fraud, counterfeit document vending and the employment of undocumented aliens in three states….Finally, Plavcak and Gloncakova forfeited any reasonable expectation of privacy when they took the documents and computer from their apartment, purchased lighter fluid, and proceeded to the Russians' apartment and began destroying the evidence. It is well settled that a person has no reasonable expectation of privacy where he is neither a resident nor an overnight guest in a residence." ■

Online Forensics Library

NLADA has a constantly improving and growing library of forensics related resources. The NLADA Forensics Library has briefs, memoranda, transcripts, training materials, weblinks and more resources available for a variety of forensics issues including forensics Laboratories, Autopsies, Bitemarks, Canines, Child Sex Allegations, Eyewitness Identification, Accident Reconstruction, Arson, Blood Spatter, DNA and more.
http://www.nlada.org/Defender/forensics

KENTUCKY CASE REVIEW

by Sam Potter, Appeals Branch

Sam Potter

Mark Leo Thomas v. Commonwealth
Rendered 6/16/05, To Be Published
Reversing and Remanding
2005 WL 1580263
Opinion by Cooper, Wintersheimer dissents

This case grew out of an altercation that occurred at the "R Place Pub" in Louisville. Mark Leo Thomas drew a handgun and shot Robert Beckwith once in the leg and Tilden Linker three times in the hip. Thomas suffered a fractured jaw, cheekbones, sinuses, and had several teeth pulled. Thomas asserted self protection at his trial. The victims claimed other bar patrons injured Thomas while subduing him until the police arrived. A jury convicted Thomas of first degree assault for shooting Beckwith, and second degree assault, under the wantonly held belief in the need to use self protection, for shooting Linker.

The Kentucky Supreme Court originally affirmed his convictions in an opinion rendered in December 2004. Justice Cooper dissented from that opinion and was joined by Justices Lambert and Keller. The Court then granted Thomas' petition for rehearing after Justice Scott replaced Justice Stumbo and then rendered this opinion. The Supreme Court reversed his convictions and remanded his case for a new trial for the reasons that follow.

The trial judge should have instructed the jury on extreme emotional disturbance because Thomas had been mugged before. The Supreme Court wrote that a trial court should instruct a jury on EED when a reasonable explanation or excuse exists for an enraged, inflamed, or disturbed emotional state that overcomes a person's judgment causing that person to act uncontrollably. The person must act because of the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. EED is a temporary state of mind and not a mental disease or defect.

The Commonwealth's evidence suggested that Thomas tried to grab Beckwith's date, that Thomas wanted to take it outside, and that he started shooting as soon as they got outside. Thomas' theory differed dramatically. Thomas had been mugged in Florida, which resulted in a serious injury to his left eye that required surgery and implantation of metal plates. In town for a visit, Thomas went to the pub to see the bartender who was his friend. According to Thomas, he and Beckwith's "domestic companion" smiled at each other. This prompted Beckwith to suggest to Thomas that they take it outside. Thomas decided he needed to leave and asked the bartender to call a taxi. He retrieved his luggage, which included a handgun, from behind the bar, and went outside to wait. Beckwith and Linker followed him.

Beckwith and Linker shoved and punched Thomas when they got outside, knocking him down. Beckwith jumped on top of Thomas continuing to beat him until Linker pulled him off. Thomas testified the beating injured his surgically repaired eye and that he felt like he was going to die. After Beckwith got off him, Thomas retrieved his gun from his luggage. Linker tried to grab it from Thomas. Thomas again testified that he feared for his life at this point. He fired five shots. The first he claimed was warning shot, but actually hit Beckwith in the leg. The second shot hit no one, and the last three hit Linker. Then the bartender and other bar patrons wrestled Thomas to the ground. The Supreme Court held that this evidence warranted an EED instruction.

A trial court must instruct the jury on the whole law of the case, including defenses and lesser included offenses. The trial court concluded that no triggering event occurred and did not instruct the jury on EED. The Supreme Court said this was true considering only the CW's version of events. However, the trial judge has the duty to instruct on the whole law of the case. This includes defenses available to the defendant if they can be supported to any extent by the testimony. Lesser included offenses function in fact and principle as defenses against the higher charge.

Evidence supporting the defense of self-protection may also support the defense of extreme emotional disturbance. A claim of self defense does not necessarily negate a claim of EED, nor does it automatically establish EED. The theories are not mutually exclusive, but each theory must be supported by the evidence for the trial court to instruct on each theory.

Statements made by Beckwith and Linker to the police at the emergency room should not have been admitted as excited utterances. Beckwith and Linker testified that, after the fight at the pub, they were taken to the emergency room for treatment. Detective Joseph Woosley interviewed both of them there about 30 minutes after the fight. The Commonwealth called Woosley to testify about what Beckwith and Linker told him during those interviews. Thomas objected on hearsay grounds. The prosecutor said the statements would be consistent with their testimony. The trial court properly excluded those statements because no claim of re-

Continued on page 36

Continued from page 35

cent fabrication or improper influence existed. However, the trial court allowed them under the excited utterance exception.

For a statement to qualify under the excited utterance exception, the declarant must have made the statement in a spontaneous, excited, or impulsive manner rather than in a reflective and deliberate manner. Spontaneity, as opposed to mere proximity in time, is a most important consideration. The Supreme Court listed eight factors to consider when determining whether a statement is an excited utterance or not. The Court noted that both Beckwith and Linker had a motive to lie, that Woosley did testify that they appeared excited, that Beckwith did not claim to be excited when he talked to Woosley, that Linker denied even talking to Woosley in the emergency room, that the statements were not made at the scene, that they were in response to questioning, and that they were self serving. Considering all this, the Supreme Court held that the CW failed to meet its burden of proving that the exception applies and declared that the admission of the statements was clearly erroneous.

The trial court should not have permitted the prosecutor to ask a hypothetical question about Thomas' blood alcohol level at the time of the offense. Thomas' BAC at two hours after the fight was .141. The Commonwealth asked the doctor to perform a "retrograde extrapolation" to estimate what the BAC of a hypothetical person, who had a history of alcohol abuse, would have been two hours before being tested. The doctor testified it would have been .21.

Three factors must be met before asking a hypothetical question. First, the assumptions used in a hypothetical question must accurately reflect the evidence. Second, the evidence must be competent to support each assumption. Third, the supporting evidence had to be sufficient to support findings by the jury on every assumption essential to the validity of the opinion, though the evidence did not have to be uncontradicted.

In Thomas' case, testimony suggested he was intoxicated that night, but no testimony at all suggested he had a history of alcohol abuse. Thus, the question served no purpose other than insinuating that Thomas was a person of bad moral character in violation of KRE 404(a)(1). The prosecutor should not have been allowed to ask the question.

Demond T. Brown v. Commonwealth
Rendered 6/16/05, To Be Published
Affirming
2005 WL 1412379
Opinion by J. Cooper, J. Scott dissents

This case stands out as the only murder conviction obtained in Kentucky from a traffic accident, in which there was neither alcohol, nor speeding nor charges of reckless driving. Demond T. Brown, drove his Ford Crown Victoria car into an intersection against a red light shortly after getting off work. He collided with another car operated by Debra Conklin and occupied by her teenage daughter, Megan. Both were killed. Timothy Brown and Laticia Leavell, passengers in Brown's car, were injured. Brown was convicted of two counts of wanton murder and two counts of wanton endangerment. The jury recommended the minimum sentence available to them of 20 years in prison.

The Kentucky Supreme Court held that Brown's actions rose to the level of wanton conduct that manifested an extreme indifference to the value of human life. A defendant must have a more egregious mental state than mere wantonness to be convicted of wanton murder. The element of "extreme indifference to human life" elevates wanton homicide to the same level of culpability as intentional homicide. In unintentional vehicular homicide cases, evidence that shows a defendant was under the influence of alcohol typically satisfies the aggravating element, though being under the influence is not a prerequisite.

The Court held that the evidence established that Brown knew the light was going to turn red. He knew another vehicle could have been driving through the intersection at the same time. He knew a collision could hurt or kill those involved. He offered no excuse for his conduct. He only said he was trying to "time" the light. Though there was no direct evidence that Brown was speeding, the jury may have inferred that Brown was racing with his friend, Michael Kaylor. Taking this evidence in the light most favorable to the Commonwealth, the trial judge properly denied Brown's motion for a directed verdict.

Juror testimony is generally incompetent to impeach a verdict. Brown appealed the denial of his new trial motion which alleged that the jury considered extrajudicial evidence during deliberations. This evidence included an affidavit from one juror that stated another juror said during deliberations that he had heard rumors that Brown and Kaylor had been racing. Also, an article from the *Courier-Journal* included statements from three jurors who believed Brown and Kaylor had been racing.

Juror testimony may suffice in some situations, including out of court experiments conducted by jurors or a juror consulting a priest who advised her it would not be a sin to impose the death penalty. Considering this general rule in light of Kaylor's testimony at trial that "it got started somehow that I was racing, which I wasn't. I don't know where it came from," the Supreme Court concluded that the affidavit and article did not demonstrate that the jury considered extrajudicial evidence.

Justice Scott's dissent — Justice Scott wrote an indignant dissent. He compares Brown's actions to those attacked in civil cases, to demonstrate that the majority of the Court exaggerates the criminality of Brown's conduct. He also notes

that trial counsel failed to preserve the issues adequately for complete appellate review. The dissent is valuable reading for trial counsel who would wish to establish a proper foundation to attack a charge of wanton murder.

Most notably, Scott questions "So what have we got? A young kid who made a terribly tragic mistake in thinking his light would turn green and ended up killing two innocent people. Something he'll regret for the rest of his life. But is he guilty of "wanton murder" as the majority says, as opposed to being guilty of second degree manslaughter and/or reckless homicide? …Brown was driving at a rate exceeding the speed limit. This was a 55 mile per hour four-lane and the evidence established he was driving 60-65 miles per hour. In civil cases, we have denied "punitive damages" on accidents up to ten miles per hour over the speed limit, even when the collision occurs in the wrong lane. *See Kinney v. Butcher*, 131 S.W.3d 357. In contrast, Larry Mahoney, drove into a bus going the wrong way in a drunken stupor, killing twenty-seven people. He was sentenced to 16 years and released on probation after serving 9 years. *Commonwealth v. Mahoney*, 1988-CA-001635-MR. "While we have the power, to some extent, to interpret, control, or influence, the boundaries of criminal conduct, we must always strive to maintain the standards of punishment at determinative levels based upon the culpability involved. If this case stands affirmed, we have not met our obligation—we have laid it down."

A petition for rehearing is pending in Mr. Brown's case.

Commonwealth v. Lorrie Mitchell
Final 7/7/05, Reversing
165 S.W.3d 129
Opinion by J. Johnstone

Lorrie Mitchell sold six Oxycontin pills to a police informant. She was convicted of first degree trafficking in a controlled substance and sentenced to seven and a half years in prison. The Court of Appeals reversed her conviction due to the cumulative effect of several errors. The Supreme Court reversed the COA and reinstated her conviction and sentence.

"Send a message to the community" arguments may be improper, but where no objection was made at trial, the Court declines to find palpable error. Kentucky does not have a bright line rule prohibiting "send a message to the community" closing arguments. Instead, Kentucky compares this kind of argument to remarks which tend to coerce a jury to reach a verdict that would meet with public favor or suggestions that a jury convict on grounds not reasonably inferred from the evidence. The lesson of this case is that the objection of trial counsel and a statement of prejudice at trial is critical to prevailing on appeal.

Testimony of the effects a drug has on a user is not expert scientific testimony, though it may not be relevant testimony in a trafficking case. Detective Randy Hunter testified that Oxycontin is a synthetic Morphine tablet. He stated that the drug is more potent and addictive if the pills are crushed and either snorted or injected, and that an addict would require increasing amounts of the drug to continue to achieve the same level of intoxication.

The Supreme Court agreed with the Court of Appeals that this had little if any relevance to the underlying charges. The Supreme Court disagreed with the Court of Appeals that the testimony contained expert scientific information. The Supreme Court noted that "defense counsel did not object to the substance of Detective Hunter's testimony, but rather that he was being portrayed as an expert." Because Mitchell's trial counsel objected to Hunter being portrayed as an expert rather than to the substance of the testimony, the Supreme Court found no reversible error.

Specific grounds must be stated in an objection for the issue to be preserved for appellate review. The prosecutor had asked Hunter how Mitchell became the subject of his investigation. His answer included the phrase, "I had received some other complaints." Mitchell's lawyer said "objection." The judge said "overruled." Then Hunter continued saying that these other complaints verified the informant's information in this case.

The Supreme Court ruled that this simple objection did not preserve the issue, writing that "given the ambiguous nature of defense counsel's objection, this issue is not adequately preserved for review." Proper grounds for this objection would have been either KRE 404(b) or investigative hearsay or both. The Supreme Court found that no palpable error occurred and no manifest injustice resulted. ■

Supreme Court's eight factors for considering an excited utterance:

(i) lapse of time between the main act and the declaration [the only factor considered here],
(ii) the opportunity or likelihood of fabrication,
(iii) the inducement to fabrication,
(iv) the actual excitement of the declarant,
(v) the place of the declaration,
(vi) the presence there of visible results of the act or occurrence to which the utterance relates,
(vii) whether the utterance was made in response to a question, and
(viii) whether the declaration was against interest or self-serving.

- Thomas v. Commonwealth

PRACTICE CORNER
LITIGATION TIPS & COMMENTS

"Practice Corner" is brought to you by the staff in DPA's Post Trial Division

It's Not Over 'Til It's Over
Post-Conviction Forfeiture Orders
Must Be Separately Appealed

In appropriate (and occasionally inappropriate) cases, trial courts often entertain forfeiture motions after the final judgment has been entered. In many cases, this results in a forfeiture order being entered days, possibly weeks, after the defendant's sentencing. If the underlying case is being appealed, the notice of appeal filed within thirty days of the judgment preserves all issues, including forfeiture, for appeal, right? WRONG!!

In *Howell v. Commonwealth*, 163 S.W.3d 442, 445-46 (Ky. 2005), the Kentucky Supreme Court refused to hear the defendant's Due Process challenge to a post-judgment forfeiture order. Although the defendant had appealed his conviction and the Commonwealth had appealed the forfeiture order (on other grounds, of course), the defendant's challenges were procedurally barred because he had not separately appealed the order. Citing both Kentucky and federal precedent, the Court said that it was without jurisdiction to determine the propriety of the forfeiture in Mr. Howell's case.

One could note that appealing the conviction itself could result in the conviction being overturned and therefore the basis of the forfeiture would no longer exist, even if the prior forfeiture order was not appealed. While this is factually correct, there are real costs to not appealing the forfeiture order at the right time:

1) As in *Howell*, challenges to the order cannot be heard as part of the underlying appealed;

2) The failure to appeal the order cannot likely be corrected later. By the time the appellate attorney identifies any issues relating to the forfeiture order, the time will have passed for a Notice of Appeal to be filed. Currently, the Court of Appeals is not granting leave to file belated appeals on any post-conviction actions;

3) The forfeiture order can become final and be Law of the Case should the case be remanded to the court for further proceedings or resentencing;

4) Non-cash forfeited property may be unrecoverable once the forfeiture order is unappealed and final;

If the underlying case is from a trial or a conditional plea and is being appealed, always appeal the forfeiture order. If the underlying case resulted in an unconditional plea and forfeiture is questionable, you can file a Notice of Appeal on the issue of forfeiture alone. Unless it is part of the plea agreement, an unconditional plea does not waive the right to appeal any parts of the sentence in violation of law.

When appealing forfeiture, a separate Notice of Appeal is not necessary if the forfeiture order is incorporated in the Final Judgment. If forfeiture is ordered in a separate order, a separate Notice of Appeal is likely required and should be filed (if it turns out to be duplicative, it can be easily fixed later). Most of the same documents required for the appeal from the judgment will also be required for the appeal from the order (*i.e.*, Designation of Record, IFP order, etc.). To answer a question your local clerk is likely to ask: Yes, the appeal from the forfeiture order goes to the Court of Appeals even if the judgment is appealed as a matter of right to the Supreme Court. The Court of Appeals will likely transfer and consolidate the appeals, but all non-death post-conviction cases go to the Court of Appeals first.

I know and have experienced the sigh of relief once a case is over and can be pitched into the "Closed" stack. Once this is done, there is a tendency to ignore later paperwork as mere formalities. When it comes to forfeiture orders, however, there may be a real cost to the client of not taking the time to file a Notice of Appeal from that order.

Practice Corner is always looking for good tips. If you have a practice tip to share, please send it to Damon Preston, Appeals Branch Manager, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■

Recruitment of Defender Litigators

The Kentucky Department of Public Advocacy seeks compassionate, dedicated lawyers with excellent litigation and counseling skills who are committed to clients, their communities, and social justice. If you are interested in applying for a position please contact:

Alfred Adams
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel:(502)564-8006; Fax:(502)564-7890
E-Mail: AlfredG.Adams@ky.gov

Further information about Kentucky public defenders is found at: http://dpa.ky.gov/

Information about the Louisville-Jefferson County Public Defender's Office is found at:
http://www.louisvillemetropublicdefender.com/

KACDL Events

19th Annual Seminar will be held Friday, November 18, 2005 from 8:00 a.m. until 5:00 p.m. at Caesar's Palace in Elizabeth, Indiana. (Right outside of Louisville, Kentucky.) There is a room discount for anyone that calls in within 30 days of the event.

The cost is as follows:
$200.00 KACDL Attorney member
$250.00 non-member attorney
$100.00 KACDL non-attorney member
$125.00 Full-time Public Defender
$ 50.00 Law Student

KACDL
Charolette Brooks
Executive Director
Tel: (606) 677-1687/(606) 678-8780/(606) 679-8780
Fax: (606) 679-3007
Web: kacdl2000@yahoo.com

PRESORTED STANDARD
U.S. POSTAGE PAID
LEXINGTON, KY
PERMIT # 1

THE ADVOCATE

Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

Address Services Requested

Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

Litigation Practice Institute
Kentucky Leadership Center
Faubush, KY
October 9-14, 2005

Annual Conference
Holiday Inn, Cincinnati Airport
Erlanger, KY
June 12-14, 2006

**** KBA ****

Annual Seminar
Covington, KY
June 14-16, 2006

NOTE: DPA Education is open only to criminal defense advocates.

For more information:
http://dpa.ky.gov/education.html

For more information regarding KACDL programs:

Charolette Brooks, Executive Director
Tel: (606) 677-1687
Fax: (606) 679-3007
Web: kacdl2000@yahoo.com

****

For more information regarding NLADA programs:

NLADA
1625 K Street, N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 452-0620
Fax: (202) 872-1031
Web: http://www.nlada.org

****

For more information regarding NCDC programs:

Rosie Flanagan
NCDC, c/o Mercer Law School
Macon, Georgia 31207
Tel: (478) 746-4151
Fax: (478) 743-0160

**** NLADA****

Annual Conference
Orlando, Florida
November 16 - 19, 2005

**** KACDL****

Annual Conference
Caesar's Palace
Elizabeth, Indiana
November 18, 2005